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No. 10258

United States
Circuit Court of Appeals
For the Ninth Circuit.

Vol. 2318

NEW YORK LIFE INSURANCE COMPANY,
a corporation,
Appellant,

vs.

RETA D. MILLER and WARREN D. MILLER,
MARCIA M. MILLER, minors, by Reta D.
Miller, Guardian,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
For the District of Oregon

FILED

NOV - 3 1942

PAUL P. O'BRIEN,
CLERK

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Circuit Court of Appeals
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Portland, Oregon,
for Appellee.

In the District Court of the United States
for the District of Oregon

July Term, 1941.

Be It Remembered, That on the 4th day of September 1941, there was duly filed in the District Court of the United States for the District of Oregon, an Amended Complaint, in words and figures as follows, to wit: [1*]

In the District Court of the United States
for the District of Oregon

No. 779

RETA D. MILLER, and WARREN D. MILLER,
MARCIA M. MILLER, Minors, by RETA
D. MILLER, Guardian,

Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a foreign corporation,

Defendant.

AMENDED COMPLAINT

Come now the above named plaintiffs, and with leave of the Court first having been obtained, file an Amended Complaint, and for their first cause of action against the above named defendant, allege:

*Page numbering appearing at foot of page of original certified Transcript of Record.

I.

That at all times hereinafter mentioned, the plaintiffs were, and now are, residents and citizens of Yamhill County, Oregon, and the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of New York, and that the amount in dispute herein, exceeds the sum of \$3,000.00 exclusive of interest and costs.

II.

That on the 24th day of December, 1925, the plaintiff, Reta D. Miller, intermarried with Warren L. Miller in the County of Yamhill, State of Oregon, and ever since said date to the 3rd day of December, 1940, being the date of the death of the said Warren L. Miller, as hereinafter alleged, the plaintiff, and the said Warren L. Miller, were wife and husband, and the said plaintiff, Reta D. Miller, is now the surviving wife of the said Warren L. Miller.

III.

That there was born to said union the issue of said marriage, Warren D. Miller, a son, and Marcia M. Miller, a daughter, [2] who are minors and of the ages of eight and three years respectively, and that on the 19th day of August, 1941, the County Court of Yamhill County, Oregon, sitting in probate, appointed the plaintiff, Reta D. Miller, the guardian of said minors, and who now is the duly appointed, qualified and acting guardian of the persons and estates of said minors, Warren D. Miller and Marcia M. Miller.

IV.

That on the 17th day of July, 1939, in consideration of the payment to it of a quarter-annual premium of \$28.62, defendant, by its agent, duly authorized thereto, executed and delivered its policy of life insurance in writing, No. 17 395 774, to the said Warren L. Miller on his life, in the sum of \$3,000.00, payable to Reta D., wife of the insured, or in the event of her death, to Warren D. and Marcia M. Miller, children of the insured, upon receipt of due proof on forms prescribed by the company, of the death of the said Warren L. Miller, and it is further provided in said policy, if death of said Warren L. Miller occurs on or before the 17th day of July, 1954, then the defendant further promised and agreed to pay to the beneficiary of Warren L. Miller, a monthly income of \$30.00 beginning as of the date of the death of the insured, and terminating on the last monthly income date prior to the 18th day of July, 1954. That it is further provided in said policy, and in consideration of such quarter-annual payments made as aforesaid, and as a cumulative rider to said policy, that in the event the said insured, Warren L. Miller, suffered accidental death which resulted directly, exclusively and independently of all other causes, from accidental bodily injuries, whereupon the said defendant further promised and agreed to pay the beneficiary under said policy the further sum of \$3,000.00 upon receipt of due proof on forms prescribed by said company, all according to the terms, stipulations and conditions

therein contained, a photostatic copy of said policy, with the application therefor, and endorsements thereon, is in the [3] hands of the defendant, marked "Exhibit A" and by this reference, made a part of this complaint.

V.

(Amended by order of court Jan. 20, 1942 in open Court.)

That thereafter the said Warren L. Miller continued to pay the quarter-annual premiums upon said policy quarterly and in advance according to the terms and conditions thereof, including the quarterly premium due on July 17, 1940. That on November 13, 1940 said Warren L. Miller gave to defendant a check dated November 17, 1940 in payment of the premium due October 17, 1940. That the defendant accepted said check on November 13, 1940 as full payment of the said premium referred to, due October 17, 1940. That said policy remained and was in full force and effect on the 3rd day of December 1940.

VI.

That on the 27th day of November, 1940, in Yamhill County, State of Oregon, said insured, Warren L. Miller, while engaged in his regular vocation, suffered certain bodily injuries, effected solely through external violent and accidental means, from which injuries said Warren L. Miller lingered until the 3rd day of December, 1940, and which resulted in his death on said 3rd day of December, 1940, directly, exclusively and independently of all other

causes and from said accidental, bodily injuries, to-wit: Said insured was attacked and gored by a mad bull while on his farm about 3½ miles Northeast of the city of McMinnville, Yamhill County, Oregon, and while engaged in his regular business of farming and dairying, and which said injuries were not self-inflicted while the said insured was insane or otherwise.

VII.

That thereafter, on the 5th and 20th days of December, 1940, respectively, the plaintiff, Reta D. Miller, gave to the defendant, both to its branch office in the city of Portland, Oregon, and its home office in the city of New York, State of New York, full and complete details of the death of the said insured, Warren L. Miller, and of all circumstances attending the same, and of her relationship to the said insured and of her interest in said accident policy of life insurance, and of all other circumstances attending and surrounding the death of the said Warren L. Miller, [4] and then and there demanded from the defendant its standard blank forms of proof as prescribed by the said defendant in said policy of insurance, so that she might make a duly verified proof of all of said matters and things so communicated to the defendant, as aforesaid, and of all such additional things as might be required by the defendant, and suggested by said blank proof forms.

VIII.

That the defendant then and there refused to furnish to the plaintiffs blank forms, prescribed by the defendant company, and did then and there deny any and all liability resting upon said defendant under said policy, and then and there stated to said plaintiff, and refused to pay any sum of money to plaintiffs by way of indemnity or otherwise. That the defendant had full knowledge of the death of the said insured, and of the manner and cause and circumstances thereof, claiming that the said defendant was in no way liable upon said life insurance policy, and refused to forward its blank forms, further claiming that said policy stood lapsed on the company's record.

IX.

That by reason of the statements made by the defendant to plaintiffs as aforesaid, and by reason of the defendant's denial of its liability upon said life insurance policy, plaintiffs did not furnish defendant affirmative proof of the death of the said insured in writing upon blank forms required by the company as mentioned in said policy of insurance, but in all other respects plaintiff and said insured have duly performed all of the terms and conditions of said contract of insurance herein, on their part to be performed.

X.

That there is now due and owing under and by virtue of the terms of said life insurance policy No. 17 395 774, the sum of \$6,000.00, payable to the designated beneficiary in said policy, with interest

thereon at the rate of 6% per annum and the further sum of [5] \$30.00 per month, for each and every month beginning with the 3rd day of December, 1940, and terminating on the 18th day of July, 1954.

XI.

That the sum of \$1,500.00 is a reasonable sum to be allowed plaintiffs as attorneys fees in this, their first cause of action against the defendant.

Plaintiffs, as a separate, further and second cause of action against the defendant, allege:

I.

Plaintiffs here repeat, re-allege, re-aver, and incorporate by reference, all of the allegations contained in Paragraphs I, II and III of the first cause of action in this complaint and pray that the same may be deemed and taken as a part of this cause of action, the same as though set out at length.

II.

That on the 29th day of February, 1940, in consideration of the payment to it of a quarter-annual premium of \$20.10, the defendant, by its agent duly authorized thereto, executed and delivered its policy of life insurance in writing, No. 17 395 775 to the said Warren L. Miller on his life, to take effect as of the 17th day of July, 1939, in the sum of \$2,000.00, payable to Reta D., wife of the insured, or in the event of her death, to Warren D. and Marcia M. Miller, children of the insured, upon re-

ceipt of due proof on forms prescribed by the company of the death of the said Warren L. Miller, and it is further provided in said policy, if the death of the said Warren L. Miller occurs on or before the 17th day of July, 1959, then the said defendant further promised and agreed to pay to the beneficiary of Warren L. Miller a monthly income of \$20.00, beginning as of the date of the death of the insured and terminating on the last monthly income date prior to [6] the 18th day of July, 1959. That it is further provided in said policy and included in the consideration of said quarter-annual payments as aforesaid, that in the event the said Warren L. Miller suffered death by accidental means, that the said company then and in that event, promised and agreed to pay the beneficiary designated in said policy, an additional amount of \$2,000.00 upon receipt of due proof on forms prescribed by said company, in accordance with the terms, stipulations and conditions contained therein, a photostatic copy of said policy, with the application therefor, and the endorsement thereon, is in the hands of the defendant, marked "Exhibit B", and by this reference, made a part of this complaint.

III.

(Amended by order of Court Jan. 20, 1942
in open Court.)

That thereafter the said Warren L. Miller continued to pay the quarter-annual premiums upon said policy quarterly and in advance according to

the terms and conditions thereof, including the quarterly premium due on July 17, 1940. That on November 13, 1940 said Warren L. Miller gave to defendant a check dated November 17, 1940 in payment of the premium due October 17, 1940. That the defendant accepted said check on November 13, 1940 as full payment of the said premium referred to, due October 17, 1940. That said policy remained and was in full force and effect on the 3rd day of December, 1940.

IV.

That on the 27th day of November, 1940, in Yamhill County, State of Oregon, said insured, Warren L. Miller, while engaged in his regular vocation, suffered certain bodily injuries, effected solely through external violent and accidental means, from which injuries said Warren L. Miller lingered until the 3rd day of December, 1940, and which resulted in his death on said 3rd day of December, 1940, directly, exclusively and independently of all other causes and from said accidental, bodily injuries, to-wit: Said insured was attacked and gored by a mad bull while on his farm about 3½ miles Northeast of the city of McMinnville, Yamhill County, Oregon, and while engaged in his regular business of farming and dairying, and which said injuries were not self-inflicted while the said insured was insane or otherwise. [7]

V.

That thereafter, on the 5th and 20th days of December, 1940, respectively, the plaintiff, Reta D.

Miller, gave to the defendant, both to its branch office in the city of Portland, Oregon, and its home office in the city of New York, State of New York, full and complete details of the death of the said insured, Warren L. Miller, and of all circumstances attending the same, and of her relationship to the said insured and of her interest in said accident policy of life insurance, and of all other circumstances attending and surrounding the death of the said Warren L. Miller, and then and there demanded from the defendant its standard blank forms of proof as prescribed by the said defendant in said policy of insurance, so that she might make a duly verified proof of all of said matters and things so communicated to the defendant, as aforesaid, and of all such additional things as might be required by the defendant, and suggested by said blank proof forms.

VI.

That the defendant then and there refused to furnish to the plaintiffs blank forms, prescribed by the defendant company, and did then and there deny any and all liability resting upon said defendant under said policy, and then and there stated to said plaintiff, and it refused to pay any sum of money to plaintiffs by way of indemnity or otherwise. That the defendant had full knowledge of the death of the said insured, and of the manner and cause and circumstances thereof, claiming that the said defendant was in no way liable upon said life insurance policy, and refused to forward its blank forms,

further claiming that said policy stood lapsed on the company's record.

VII.

That by reason of the statements made by the defendant to plaintiffs as aforesaid, and by reason of the defendant's denial of its liability upon said life insurance policy, plaintiffs [8] did not furnish defendant affirmative proof of the death of the said insured in writing upon blank forms required by the company as mentioned in said policy of insurance, but in all other respects plaintiff and said insured have duly performed all of the terms and conditions of said contract of insurance herein, on their part to be performed.

VIII.

That there is now due and owing under and by virtue of the terms of said life insurance policy No. 17 395 775, the sum of \$4,000.00, payable to the designated beneficiary in said policy, with interest thereon at the rate of 6% per annum, and the further sum of \$20.00 per month, for each and every month beginning with the 3rd day of December, 1940, and terminating on the 18th day of July, 1959.

IX.

That the sum of \$1,000 is a reasonable sum to be allowed plaintiffs as attorneys fees in this, their second cause of action against the defendant.

Wherefore, plaintiffs demand judgment against the defendant for the full sum of \$6,000.00, with

interest thereon at the rate of 6% per annum, the further sum of \$30.00 per month beginning as of the 3rd day of December, 1940, and terminating on the last monthly income date prior to the 18th day of July, 1954, and the further sum of \$1,500.00 attorneys fees on the first cause of action; and the sum of \$4,000.00 with interest thereon at the rate of 6% per annum, together with the further sum of \$20.00 per month, beginning as of the 3rd day of December, 1940, and terminating on the last monthly income date prior to the 18th day of July, 1959, and the further sum of \$1,000 attorneys fees on the second cause of [9] action, and for their costs and disbursements herein.

GEORGE NEUNER and
GEORGE WM. NEUNER
801 Public Service Bldg.
Portland, Oregon
Attorneys for Plaintiffs

[Endorsed]: Filed September 4, 1941. [10]

And Afterwards, to wit, on the 9th day of September, 1941, there was duly Filed in said Court, an Answer to Amended Complaint, in words and figures as follows, to wit: [11]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and for answer to the first cause of action set out in plaintiffs' amended complaint and admits, denies and alleges as follows:

I.

Admits Paragraphs I, II and III of plaintiffs' first cause of action.

II.

Admits that on or about the 13th day of July, 1939, in consideration of the application therefor and of the payment in advance of the sum of \$28.62 constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, 1939, and of a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for fifteen full years should have been paid, and of the payment of a reduced premium of \$24.96 every three calendar months thereafter during the lifetime of the insured, defendant issued its Policy of Insurance No. 17 395 774 to Warren L. Miller as the insured, wherein it agreed to pay to

Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be surviving as the benefits under said policy severally become due and payable, share and share alike, [12]

as beneficiary, \$3,000 (the face of said policy) as provided in said policy, upon receipt of due proof on forms prescribed by defendant of the death of said Warren L. Miller, and if such death should occur on or before the 17th day of July, 1954, defendant agreed to pay said beneficiary a monthly income of \$30.00 beginning as of the date of the death of the insured and terminating on the last monthly income date prior to the 18th day of July, 1954; and if due proof of the death of the insured should be received on or before the 17th day of July, 1954, the face amount of the policy was payable upon said date; and if such proof should be received after said date the face amount was payable upon receipt thereof.

Admits that there was a supplemental agreement issued as a part of and attached to said policy wherein in consideration of the payment in advance of an additional quarter-annual premium of \$1.98, which was included in and payable as part of the premium stated in said policy, and of the payment of a like sum as part of each premium after the first payable under said policy, defendant agreed to pay to the beneficiary under said policy \$3,000 upon receipt of due proof on form prescribed by the company that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means.

Admits that said agreements were all according to the terms, stipulations and conditions contained

in said policy, and admits that a photostatic copy of said policy with a copy of the application therefor marked Exhibit "A" was attached to plaintiff's original complaint on file herein, and that defendant has a copy of the same, and deny each and every other allegation set out in Paragraph IV of plaintiff's first cause of action. [13]

III.

Admits that the quarter-annual premiums upon said policy were paid up to and including the quarter-annual premium due July 17, 1940, but no more, and denies that said policy remained and was in full force and effect on the 3rd day of December, 1940, and denys each and every other allegation set out in Paragraph V of plaintiffs' first cause of action, and alleges that said policy lapsed for non-payment of the quarter-anual premium due on October 17, 1940.

IV.

Admits Paragraph VI, VII and VIII of plaintiffs' first cause of action.

V.

Denies each and every allegation contained in Paragraph IX of plaintiffs' first cause of action.

VI.

Denies each and every allegation contained in Paragraph X of plaintiffs' first cause of action and denies that the sums mentioned in said paragraph, or any sum or sums, is now due and payable to

plaintiffs or any of them under and by virtue of the terms of Policy of Insurance No. 17 395 774 or otherwise.

VII.

Denies that the sum of \$1,500.00 or any sum is a reasonable sum to be allowed plaintiffs as attorneys' fees under their first cause of action.

And for a first further and separate answer and defense to plaintiffs' first cause of action defendant alleges:

I.

That on or about the 13th day of July, 1939, in consideration of the application therefor and of the payment in advance of the sum of \$28.62 constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, [14] 1939, and a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for fifteen full years should have been paid, and of the payment of a reduced premium of \$24.96 every three calendar months thereafter during the lifetime of the insured, defendant issued its Policy of Insurance No. 17 395 774 to Warren L. Miller as the insured, wherein it agreed to pay to

Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be surviving as the benefits under said policy severally become due and payable, share and share alike,

as beneficiary, \$3,000 (the face of said policy) as provided in said policy, upon receipt of due proof on forms prescribed by defendant of the death of said Warren L. Miller, and if such death should occur on or before the 17th day of July, 1954, defendant agreed to pay said beneficiary a monthly income of \$30.00 beginning as of the date of the death of the insured and terminating on the last monthly income date prior to the 18th day of July, 1954; and if due proof of the death of the insured should be received on or before the 17th day of July, 1954, the face amount of the policy was payable upon said date; and if such proof should be received after said date the face amount was payable upon receipt thereof.

That there was a supplemental agreement issued as a part of and attached to said policy wherein in consideration of the payment in advance of an additional quarter-anual premium of \$1.98, which was included in and payable as a part of the premium stated in said policy, and of the payment of a like sum as part of each premium after the first payable under said policy, defendant agreed to pay to the beneficiary under said policy \$3,000 upon receipt of due proof on form prescribed by the company that the death of the insured resulted directly and independently of all [15] other causes from bodily injury effected solely through external, violent and accidental means.

II.

That said policy contained among its stipulations, provisions and conditions the following:

“Grace.—If any premium is not paid on or before the day it falls due the policyholder is in default; but a grace of thirty-one days will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be charged as an indebtedness against this Policy.

Reinstatement.—This Policy may be reinstated at any time within five years after any default, upon presentation at the Home Office of evidence of insurability satisfactory to the Company and payment of overdue premiums with interest at five per cent per annum thereon from their respective due dates. Any indebtedness to the Company at date of default, including interest thereon, must be paid, provided, however that if it is not in excess of the Cash Surrender Value as at date of reinstatement it may remain as an indebtedness subject to the loan provisions of this policy.

Rights of Insured.—During the lifetime of the Insured and without the consent of the beneficiary, whether revocably or irrevocably designated, the Insured may receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy, or allowed hereunder by the Company, unless otherwise specifically provided herein or by indorsement hereon, and except that

any irrevocably designated beneficiary can be changed only with the written consent of such beneficiary.

Payment of Premiums.—All premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized Cashier of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment and, except as may be otherwise herein provided, the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain this Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

The Contract.—This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid this Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the applica-

tion is indorsed upon or attached to this Policy when issued. No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any [16] lapse or forfeiture or any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York, and the surrender of this Policy will be required in any settlement thereof."

III.

That a quarter-annual premium of \$28.62 became due on said policy on October 17, 1940; that said premium was not paid on or before said date or at all, and said insured became in default under the terms of said policy for failure to pay said premium, and said default continued for more than thirty-one days.

IV.

That on November 17, 1940, defendant at its Oregon branch office in Portland, Oregon, received from the insured a check in the amount of \$48.72 payable to defendant's order, dated November 17, 1940, at McMinnville, Oregon, and drawn on the First National Bank of McMinnville, Oregon, and signed by L. A. Miller & Son by Warren L. Miller, the latter being the said insured, which amount equaled the amount of the quarter-annual premium of \$28.62 on Policy No. 17 395 774 and the quarter annual premium of \$20.10 on Policy No. 17 395 775 due on October 17th, 1940; that said check was regularly deposited by the defendant in the usual

course of business in the U. S. National Bank of Portland, Oregon, for presentation to the drawee bank, and in due course said check was presented to said First National Bank of McMinnville, Oregon for payment; that said bank refused payment of said check because the maker of said check did not have sufficient funds on deposit in said bank with which to pay said check; that said check was thereafter returned unpaid to defendant because of the refusal of said bank to honor and pay said check; that thereupon defendant mailed said check to said insured and advised him that said check had not been honored when presented to the bank for payment, and that by reason thereof the said premium was unpaid and that said policy lapsed by reason of [17] such non-payment within the grace period; that the grace period for the payment of said premium due on October 17th, 1940, expired on November 17th, 1940.

That by reason of the non-payment of said premium within the grace period said policy remained in default for non-payment of the premium due on October 17th, 1940, and has never been reinstated; that at the time said policy became in default for the non-payment of said premium said policy had no cash surrender value whatsoever and said policy now stands lapsed and is of no value whatsoever; that by reason of the default in payment of premiums due under said policy there is no sum whatsoever due to the beneficiaries named in said policy, or any of them.

And for answer to plaintiffs' second further and separate cause of action defendant admits, denies and alleges:

I.

Admits Paragraph I of plaintiffs' second cause of action.

II.

Admits that on or about the 29th day of February, 1940, in consideration of the application therefor and of the payment in advance of \$20.10 constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, 1939, and of a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for twenty full years shall have been paid, and of a reduced premium of \$16.64 every three calendar months thereafter during the lifetime of the insured, defendant issued its policy of insurance No. 17 395 775 to Warren L. Miller as the insured wherein it agreed to pay to

Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be surviving as the benefits under said policy severally become due and payable, share and share alike, [18]

as beneficiary, \$2,000 (the face of said policy) as provided in said policy, upon receipt of due proof on forms prescribed by the company of the death of said Warren L. Miller, and if such death should

occur on or before the 17th day of July, 1959, defendant further agreed to pay to said beneficiary a monthly income of \$20.00 beginning as of the date of the death of the insured and terminating on the last monthly income date prior to the 18th day of July, 1959, and if due proof of the death of the insured should be received on or before the 17th day of July, 1959, the face amount of the policy was payable upon said date, and if such proof should be received after said date the face amount was payable upon receipt thereof, and defendant further agreed to pay said beneficiary an additional amount of \$2,000 upon receipt of due proof that the death of the insured resulted, before the anniversary of said policy on which the insured's age at nearest birthday is sixty-five, from accidental means as defined in and subject to the provisions set forth under accidental death benefit provisions of said policy.

Admits that said agreements were all according to the terms, stipulations and conditions contained therein, and that a photostatic copy of said policy with a copy of the application therefor and the endorsements thereon, marked Exhibit "B", was attached to plaintiff's original complaint on file herein, and that defendant has a copy of the same, and denies each and every other allegation set out in Paragraph II of plaintiffs' second cause of action.

III.

Admits that the quarter-annual premiums upon said policy were paid up to and including the quar-

ter-annual premium due July 17, 1940, but no more, and denies that said policy remained and was in full force and effect on the 3rd day of December, 1940, and denies each and every other allegation set out in Paragraph [19] III of plaintiffs' second cause of action, and alleges that said policy lapsed for non-payment of the quarter-annual premium due on October 17, 1940.

IV.

Admits Paragraph IV, V and VI of plaintiffs' second cause of action.

V.

Denies each and every allegation contained in Paragraph VII of plaintiffs' second cause of action.

VI.

Denies each and every allegation contained in Paragraph VIII of plaintiffs' second cause of action and denies that the sums mentioned in said paragraph, or any sum or sums, is now due and payable to plaintiffs or any of them under and by virtue of the terms of Policy of Insurance No. 17 395 774 or otherwise.

VII.

Denies that the sum of \$1,000.00 or any sum is a reasonable sum to be allowed plaintiffs as attorneys' fees under their second cause of action.

And for a first further and separate answer and defense to plaintiffs' second cause of action defendant alleges:

I.

That on or about the 29th day of February, 1940, in consideration of the application therefor and of the payment in advance of \$20.10 constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, 1939, and of a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for twenty full years shall have been paid, and of a reduced premium of \$16.64 every three calendar months thereafter during the lifetime of the insured, defendant issued its policy of insurance No. 17 395 775 to Warren L. Miller as the insured wherein it [20] agreed to pay to

Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be surviving as the benefits under said policy severally become due and payable, share and share alike,

as beneficiary, \$2,000 (the face of said policy) as provided in said policy, upon receipt of due proof on forms prescribed by the company of the death of said Warren L. Miller, and if such death should occur on or before the 17th day of July, 1959, defendant further agreed to pay to said beneficiary a monthly income of \$20.00 beginning as of the date of the death of the insured and terminating on the last monthly income date prior to the 18th day of July, 1959, and if due proof of the death of the in-

sured should be received on or before the 17th day of July, 1959, the face amount of the policy was payable upon said date, and if such proof should be received after said date the face amount was payable upon receipt thereof, and defendant further agreed to pay said beneficiary an additional amount of \$2,000 upon receipt of due proof that the death of the insured resulted, before the anniversary of said policy on which the insured's age at nearest birthday is sixty-five, from accidental means as defined in and subject to the provisions set forth under accidental death benefit provisions of said policy.

II.

That said policy contained among its stipulations, provisions and conditions the following:

“Grace.—If any premium is not paid on or before the day it falls due the policyholder is in default; but a grace of thirty-one days will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be charged as an indebtedness against this Policy.

Reinstatement.—This Policy may be reinstated at any time within five years after any default, upon presentation at the Home Office of evidence of insurability satisfactory to the Company and payment of overdue premiums with interest at five per cent per annum thereon from their respective due dates. Any indebted-

ness to the Company at date of default, including interest [21] thereon, must be paid, provided, however, that if it is not in excess of the Cash Surrender Value as at date of reinstatement it may remain as an indebtedness subject to the loan provisions of this policy.

Rights of Insured.—During the lifetime of the Insured and without the consent of the beneficiary, whether revocably or irrevocably designated, the Insured may receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy, or allowed hereunder by the Company, unless otherwise specifically provided herein or by indorsement hereon, and except that any irrevocably designated beneficiary can be changed only with the written consent of such beneficiary.

Payment of Premiums.—All premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized Cashier of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment and, except as

may be otherwise herein provided, the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain this Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

The Contract.—This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no statement shall avoid this Policy or be used in defense to a claim under it, unless it is contained in the written application and a copy of the application is indorsed upon or attached to this policy when issued. No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the Company's rights or requirements. All benefits under this Policy are payable at the Home Office of the Company in the City and State of New York, and the surrender of this Policy will be required in any settlement thereof."

III.

That a quarter-annual premium of \$20.10 became due on said policy on October 17, 1940; that said premium was not paid on or before said date or at all, and said insured became in default under the terms of said policy for failure to pay said pre-

mium, and said default continued for more than thirty-one days.

IV.

That on November 17, 1940, defendant at its Oregon branch office in Portland, Oregon, received from the insured a check in the amount of \$48.72 payable to defendant's order, dated [22] November 17, 1940, at McMinnville, Oregon and drawn on the First National Bank of McMinnville, Oregon, and signed by L. A. Miller & Son by Warren L. Miller, the latter being the said insured, which amount equaled the amount of the quarter-annual premium of \$28.62 on Policy No. 17 395 774 and the quarter-annual premium of \$20.10 on Policy No. 17 395 775 due on October 17th, 1940; that said check was regularly deposited by defendant in the usual course of business in the U. S. National Bank of Portland, Oregon, for presentation to the drawee bank, and in due course said check was presented to said First National Bank of McMinnville, Oregon, for payment; that said bank refused payment of said check because the maker of said check did not have sufficient funds on deposit in said bank with which to pay said check; that said check was thereafter returned unpaid to defendant because of the refusal of said bank to honor and pay said check; that thereupon defendant mailed said check to said insured and advised him that said check had not been honored when presented to the bank for payment, and that by reason thereof the said premium was unpaid and that said policy lapsed

by reason of such non-payment within the grace period; that the grace period for the payment of said premium due on October 17th, 1940, expired on November 17th, 1940.

That by reason of the non-payment of said premium within the grace period said policy remained in default for non-payment of the premium due on October 17th, 1940, and has never been reinstated; that at the time said policy became in default for the non-payment of said premium said policy had no cash surrender value whatsoever and said policy now stands lapsed and is of no value whatsoever; that by reason of the default in payment of premiums due under said policy there is no sum whatsoever due to the beneficiaries named in said policy, or any of them. [23]

Wherefore, defendant having fully answered plaintiffs' amended complaint prays that the same be dismissed and that defendant have judgment against plaintiffs and each of them for its costs and disbursements herein incurred.

HUNTINGTON, WILSON &
DAVIS

Attorneys for Defendant
ROLAND DAVIS

Of Attorneys for Defendant
(Duly Verified.)

[Endorsed]: Filed September 9, 1942. [24]

And Afterwards, to wit, on the 19th day of September, 1941, there was duly Filed in said Court, a Demand for Jury Trial, in words and figures as follows, to wit: [25]

[Title of District Court and Cause.]

DEMAND FOR TRIAL BY JURY

To New York Life Insurance Company, the defendant above named, and Roland Davis, one of its attorneys:

The plaintiffs above named, and each of them, hereby demand a trial by Jury of each and all of the issues presented by the pleadings in the within cause.

Dated this 19th day of September, 1941.

GEORGE WM. NEUNER

Of Attorneys for Plaintiffs
801 Public Service Bldg.
Portland, Oregon

State of Oregon

County of Multnomah—ss.

I hereby certify that on the 19th day of September, 1941, I mailed a certified copy of the within Demand for Trial by Jury, in a postpaid, sealed wrapper, to Roland Davis, one of defendant's attorneys, at his office address, i.e. Porter Bldg., Portland, Oregon.

GEORGE WM. NEUNER

Of Attorneys for Plaintiffs

[Endorsed]: Filed September 19, 1941. [26]

And Afterwards, to wit, on Tuesday, the 20th day of January, 1942, the same being the 67th Judicial day of the Regular November, 1941, Term of said Court; presnt the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [27]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

Pre-trial proceedings before the Honorable Claude McColloch on the 20th day of October, 1941, at 11 o'clock a. m. were had, the plaintiffs appearing in person and by her attorneys, George Neuner and George Wm. Neuner, the defendant appearing by its attorneys, Huntington, Wilson & Davis, whereupon opening statements were made by respective counsel, and the pre-trial exhibits were presented and identified before Alva W. Persons, Court Reporter, and the Pre-trial conference was then adjourned to the 8th day of December, 1941, at which time it was resumed with the identical parties present, briefs having theretofore been filed by the respective counsel, in compliance with the order of the Court, with the result that the trial thereof was set for January 20, 1942, and the following facts were agreed to and stipulated by the respective parties.

ADMITTED FACTS

I.

That the plaintiff is a resident and inhabitant of Yamhill County, Oregon, and that the amount in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs. [28]

II.

That the defendant, New York Life Insurance Company, is a foreign corporation, organized under the laws of the State of New York, engaged in a life insurance business with a branch office in the City of Portland, Multnomah County, Oregon.

III.

That the plaintiff, Reta D. Miller, is the widow of Warren L. Miller, deceased, and the mother of Warren D. Miller and Marcia M. Miller, minor children of the plaintiff and the decedent, and she is the duly appointed, qualified and acting guardian of the said Warren D. Miller and Marcia M. Miller.

IV.

That Warren L. Miller was a resident of, and residing on a farm about 3 $\frac{1}{4}$ miles Northeast of McMinnville, Yamhill County, Oregon, of the age of 34 years or thereabouts, and engaged in farming and dairying.

V.

On or about the 13th day of July, 1939, defendant issued its policy of life insurance No. 17 395 774

to Warren L. Miller as insured, a resident of the State of Oregon, in which policy in consideration of the payment in advance of the sum of \$28.62, constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, 1939, and a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for fifteen full years should have been paid, and of the payment of a reduced premium of \$24.96 every three calendar months thereafter during the lifetime of the insured, it agreed that if due proof of the death of the insured was received showing that such death occurred before the 17th day of July, 1954, it would pay to Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be [29] surviving as the benefits under said policy severally become due and payable, share and share alike, as beneficiary a monthly income of \$30.00 beginning as of the date of the death of the insured and terminating on the last monthly income date prior to the 18th day of July, 1954, and to pay to said beneficiary the sum of \$3,000 on the 17th day of July, 1954.

VI.

Attached to said Policy No. 17 395 774 was a supplemental agreement issued as a part of said policy, the premium for which was included in and payable as part of the premium stated in said policy, wherein the defendant agreed to pay to the beneficiary \$3,000 upon receipt of due proof on

forms prescribed by the defendant, that the death of the insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means, and occurred within ninety days after such injury and prior to the anniversary of said policy on which the insured's age at nearest birthday is sixty-five.

VII.

On or about the 29th day of February, 1940, defendant issued its policy of insurance No. 17 395 775 to Warren L. Miller as insured, a resident of the State of Oregon, in which policy in consideration of the payment in advance of the sum of \$20.10 constituting the first premium and maintaining the policy for the period terminating on the 17th day of October, 1939, and of a like sum on said date and every three calendar months thereafter during the lifetime of the insured until premiums for twenty full years shall have been paid, and of a reduced premium of \$16.64 every three calendar months thereafter during the lifetime of the insured, it agreed that if due proof of the death of the insured was received showing that such death occurred on or before the 17th day of July, 1959, it would pay to Reta D. Miller, wife of the insured, or in the event of her death to Warren D. and Marcia M. Miller, children [30] of the insured, or to such of them as shall be surviving as the benefits under said policy severally become due and payable, share and share alike, as beneficiary a monthly income of \$20.00 beginning as of the date of the death of the

insured and terminating on the last monthly income date prior to the 18th day of July, 1959, and to pay to said beneficiary the sum of \$2,000 on the 17th day of July, 1959, and further agreed to pay to said beneficiary an additional amount of \$2,000 upon receipt of due proof that the death of the insured before the anniversary of said policy on which the insured's age at nearest birthday is sixty-five resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury.

VIII.

Plaintiff's Pre-trial Exhibits 1 and 2 hereinafter referred to are the policies of insurance involved in this suit and such policies contain the agreements between the insured and defendant on which this suit is based.

IX.

On October 17, 1940, a premium in the amount of \$28.62 became due on Policy No. 17 395 774, and on the same date a premium in the amount of \$20.10 became due on Policy No. 17 395 775. Under the provisions of both policies the insured was entitled to a grace period of thirty-one days from October 17, 1940, within which to pay said premiums.

X.

On Wednesday, November 13, 1940, A. E. Yount, a soliciting agent of the defendant called on Warren L. Miller at McMinnville, Oregon, at which time

Warren L. Miller gave to A. E. Yount a check (Pl. pre-trial Ex. 4) payable to the order of New York Life Insurance Company in the amount of \$48.72, the amount of the two quarter-annual premiums of said policies due October 17, [31] 1940. This check was dated November 17, 1940, it was signed L. A. Miller & Son by Warren L. Miller, and was drawn on the First National Bank of McMinnville, Oregon. November 17, 1940, was a Sunday.

XI.

In the afternoon of November 13, 1940, Mr. A. E. Yount returned to Portland and delivered the check to the office of R. A. Durham, Cashier of the Oregon Branch Office of defendant. Mr. Durham's office held the check until Monday, November 18, 1940, on which day he made an entry on the Daily Premium and Commission Report (Def. pre-trial Ex. 21). This was the first entry of the remittance on the books of the company. On the same day the cashier deposited the check in the U. S. National Bank of Portland, Oregon. (Def. pre-trial Ex. 12). On the same date, November 18, 1940, the cashier mailed to Warren L. Miller the official premium receipts (Def. pre-trial Exs. 10 and 11) covering the premiums in question.

XII.

The check in due course reached the First National Bank of McMinnville, Oregon, for payment on November 20, 1940. On that date the drawer of the check had a balance on deposit in the First National Bank of McMinnville, Oregon, of \$1.05.

Payment of the check was refused by the First National Bank of McMinnville, Oregon, because the drawer did not have sufficient funds on deposit to honor the check. The check was returned to the U. S. National Bank of Portland, Oregon, on Friday, November 22, 1940. November 21, 1940, was Thanksgiving Day and a holiday.

XIII.

On Monday, November 25, 1940, the check with others was returned to the cashier's office of the defendant and he gave defendant's check to the bank to take up this check with the others which had been returned unpaid. (Def. pre-trial Ex. 15). [32]

XIV.

On Tuesday, November 26, 1940, R. A. Durham, Cashier of the defendant, mailed a letter to the insured at McMinnville, Oregon, (Pl. pre-trial Ex. 3), in which the check was returned to him. On the same day, November 26, 1940, the cashier reversed the entries made on November 18, 1940, on the Daily Premium and Commission Report. (Def. pre-trial Ex. 22).

XV.

In the late afternoon of November 27, 1940, the insured, Warren L. Miller, was attacked and gored by a bull and was found by others in a semi-conscious condition that evening. He was taken to the hospital where he lingered in a coma until 7:00 a. m. December 3, 1940, when he died. (Pl. pre-trial Ex. 7).

XVI.

The plaintiff, Reta D. Miller, received the letter of R. A. Durham dated November 26, 1940, containing the dishonored check on November 28, 1940. On said date, to-wit: November 28th, she secured a postoffice money order (Pl. pre-trial Ex. 8-c) payable to the order of the defendant for the sum of \$49.07 and forwarded this money order to the defendant.

XVII.

On Monday, December 2, 1940, R. A. Durham, Cashier by letter (Pl. pre-trial Ex. 8-a) returned the money order.

XVIII.

On the 4th day of December, 1940, plaintiff notified the defendant of the accident and subsequent death of Warren L. Miller and requested blank forms to make proof of death as provided in said policies of insurance. The defendant refused to furnish said blanks on the ground that the policies had lapsed for non-payment of the premiums prior to the death. [33]

XIX.

The Oregon Branch Office of the defendant is closed on Sunday and was not open for business on Sunday, November 17, 1940. The banks of the State of Oregon were closed on Sunday and were not open for business on November 17, 1940.

XX.

It is agreed that the death of Warren L. Miller resulted directly and independently of all other

causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury, and that said death occurred before the anniversary of said policy on which the insured's age at nearest birth date was sixty-five.

EXHIBITS

The following documents were presented by the Plaintiffs and identified as exhibits for use in the trial of said cause, to-wit:

1. Plaintiffs' Pre-trial Exhibit No. 1—New York Life Ins. Co. Policy No. 17 395 774 dated July 17, 1939, for \$3,000 on the life of Warren L. Miller, payable to plaintiffs.
2. Plaintiffs' Pre-trial Exhibit No. 2—New York Life Ins. Co. Policy No. 17 395 775 dated February 29, 1940, effective as of the 17th day of July, 1939, in the sum of \$2,000 on the life of Warren L. Miller, payable to plaintiffs.
3. Plaintiffs' Pre-trial Exhibit No. 3—Letter dated November 26, 1940, by R. A. Durham, cashier, to Warren L. Miller, General Delivery, McMinnville, with reference to the two policies.
- 3-a. Plaintiffs' Pre-trial Exhibit No. 3-a—Registered envelope addressed to Warren L. Miller, General Delivery, McMinnville, Oregon, in which Pre-trial Exhibit No. 3 was mailed.
4. Plaintiffs' Pre-trial Exhibit No. 4—Check dated November 17, 1940, on the First National Bank of McMinnville, [34] Oregon, payable to New

York Life Ins. Co. in the sum of \$48.72, signed L. A. Miller & Son by Warren L. Miller.

5. Plaintiffs' Pre-trial Exhibit No. 5—Bank statement of the First National Bank of McMinnville, Oregon, for the month of November, 1940, showing the condition of the bank account during the month of November, 1940.

6. Plaintiffs' Pre-trial Exhibit No. 6—Check book stub or the stub of the check for Plaintiffs' Pre-trial Exhibit No. 4.

7. Plaintiffs' Pre-trial Exhibit No. 7—Certified copy of death certificate of Warren L. Miller.

8. Plaintiffs' Pre-trial Exhibit No. 8a—A letter dated December 2, 1940, signed by R. A. Durham, Cashier, addressed to Warren L. Miller, General Delivery, McMinnville, together with original envelope returning United States Postal Money Order No. 312 248, dated November 28, 1940, payable to New York Life Ins. Co. in the sum of \$49.07.

9. Plaintiffs' Pre-trial Exhibit No. 8a accompanied by an envelope in which it was mailed, marked Plaintiffs' Pre-trial Exhibit No. 8b, and said U. S. Postal Money Order marked Plaintiffs' Pre-trial Exhibit No. 8c.

10. Plaintiffs' Pre-trial Exhibit No. 9—A letter dated Portland, Oregon, November 27, 1940, signed by A. E. Yount, with envelope addressed to Warren L. Miller, General Delivery, stamped Portland, November 27, 7 p. m.

Two of Plaintiffs' Pre-Trial Exhibits were sealed

by the Court on behalf of Plaintiffs to be used in said trial as impeachment documents.

The following Exhibits were presented by the Defendant, marked and identified for the use in the trial of said cause, as follows:

1. Defendant's Pre-Trial Exhibit No. 10—Official [35] Premium Receipt on Policy No. 17 395 774, for the quarter-annual premium due October 17, 1940.
2. Defendant's Pre-Trial Exhibit No. 11—Official Premium Receipt on Policy No. 17 395 775 for quarter-annual premium due October 17, 1940.
3. Defendant's Pre-Trial Exhibit No. 12—A deposit slip, or copy thereof, of deposit of New York Life Ins. Co. in the United States National Bank of Portland, Oregon, on November 18, 1940, in which is shown a check on McMinnville Bank for \$48.72.
4. Defendant's Pre-Trial Exhibit No. 13—Slip marked, returned by The First National Bank of McMinnville, Oregon, original checked not sufficient funds.
5. Defendant's Pre-Trial Exhibit No. 14—Returned memo dated November 22, 1940, showing, with one other item, the amount of \$48.72.
6. Defendant's Pre-Trial Exhibit No. 15—Check No. G-2100 dated November 25, 1940, payable to the United States National Bank, signed by New York Life Ins. Co. Account No. 2, by R. A. Durham, Cashier, on which is a notation N. G. checks, and including among others No. 17 395 774-5, Miller.

7. Defendant's Pre-Trial Exhibit No. 16—Letter from Burdett & Neuner, to New York Life Ins. Co., dated December 4, 1940.
8. Defendant's Pre-Trial Exhibit No. 17—Letter to Burdett & Neuner from R. A. Durham, Cashier, dated December 5, 1940.
9. Defendant's Pre-Trial Exhibit No. 18—Letter from H. J. Laramee, Superintendent, to Mr. George Neuner, dated December 17, 1940.
10. Defendant's Pre-Trial Exhibit No. 19—Letter from Burdett & Neuner to New York Life Ins. Co., dated December 20, 1940. [36]
11. Defendant's Pre-Trial Exhibit No. 20—Letter from Louis H. Cooke, General Counsel, to Burdett & Neuner, dated December 27, 1940. In this letter was included a photostatic copy of a letter from R. A. Durham, Cashier, to Warren L. Miller, which is plaintiff's Pre-Trial Exhibit No. 3. The photostat included was not introduced as evidence, because Plaintiffs' Pre-Trial Exhibit No. 3 is the original.
12. Defendant's Pre-Trial Exhibit No. 21—Daily premium and commission report, dated November 18, 1940.
13. Defendant's Pre-Trial Exhibit No. 22—Daily premium and commission report, dated November 26, 1940.

QUESTIONS OF FACT

The ultimate questions of fact to be determined are:

a. Were the policies of insurance in force on the date of death of Warren L. Miller, to-wit: On December 3, 1940?

b. If the policies were in force on December 3, 1940, what is a reasonable attorneys' fee to be allowed the plaintiff?

The answers to the ultimate questions of fact depend on the following questions of fact:

a. Was there any agreement between Warren L. Miller and the defendant to the effect that the check dated November 17, 1940, payable to the order of the defendant would be accepted as unconditional payment of the premiums due on October 17, 1940?

b. Was the check dated November 17, 1940, payable to the order of the defendant accepted by it as unconditional payment of the premiums due on October 17, 1940?

QUESTIONS OF LAW

The following questions of law are involved:

a. In view of the provision in the policies that thirty-one days of grace will be allowed after its due date for the payment of every premium and of the fact that the 31st day after [37] the due date (October 17, 1940) of the premiums was Sunday, November 17, 1940, what was the last day within which the premiums on said policies due October 17, 1940, might be paid without the policies lapsing for non-payment of premiums?

b. If there is any evidence that an agent or cashier of the defendant company agreed to accept or did accept the check dated November 17, 1940, as unconditional payment of the premiums due October 17, 1940, was such agent or cashier authorized so to do by the defendant company?

c. If there is any evidence that an agent or cashier of the defendant company agreed to accept or did accept the check dated November 17, 1940, as unconditional payment of the premiums due October 17, 1940, but was not authorized to do so, was such agreement or acceptance ratified by the defendant company?

PLAINTIFFS' CONTENTIONS

That the check issued by Warren L. Miller and delivered to defendant's cashier on November 13, 1940, post-dated November 17, 1940, and payable to New York Life Ins. Co. for \$48.72 was accepted by the defendant as full payment of the premiums due October 17, 1940 (plfs' pre-trial ex. 4).

That the defendant by its acts and conduct ratified the acts of its agents in accepting said check in full payment of the premiums due October 17, 1940.

That the defendant waived the terms and provisions of its insurance policies and should now be estopped from asserting as a ground of forfeiture thereof the non-payment of such premiums.

That by reason thereof, both policies were in

full force and effect on December 3, 1940, the date of the death of the insured, Warren L. Miller. [38]

DEFENDANT'S CONTENTIONS

It is the defendant's contention that the insured had all day Monday, November 18, 1940, within which to pay the premiums falling due on October 17, 1940.

It further contends that there was no agreement on behalf of defendant, either by an authorized or an unauthorized person, to accept the check dated November 17, 1940, as unconditional payment of the premiums due October 17, 1940, and such check was not so accepted by defendant.

Defendant contends that the defendant did not waive any of the terms or provisions of the insurance policies and it is not estopped from asserting the non-payment of the premiums on said policies. Furthermore, there are no facts or issues in the case upon which a waiver or estoppel can be based.

It contends that the check dated November 17, 1940, was accepted conditionally upon the check being honored when presented for payment; that the check was dishonored when presented for payment and consequently the policies lapsed for non-payment of the premiums due October 17, 1940, and had never been reinstated at the time of the death of the insured. There is, therefore, no liability to the plaintiffs under the policies in suit.

All Done and Dated this 20th day of January,
1942.

CLAUDE McCOLLOCH
District Judge

Approved:

GEORGE NEUNER
Of Attorneys for Plaintiffs
ROLAND DAVIS
Of Attorneys for Defendant

[Endorsed]: Filed January 20, 1942. [39]

And Afterwards, to wit, on the 21st day of January, 194 , there was duly Filed in said Court, a Verdict, in words and figures as follows, to wit: [40]

[Title of District Court and Cause.]

VERDICT

We, the jury empaneled in this action, find in favor of the plaintiffs and assess the sum of \$1000.00 as attorney's fees in this action.

Dated January 21, 1942.

FRANK TAYLOR
Foreman

[Endorsed]: Filed January 21, 1942. [41]

And Afterwards, to wit, on Wednesday, the 28th day of January, 1942, the same being the 74th Judicial day of the Regular November, 1941, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [42]

In the District Court of the United States
For the District of Oregon

No. 779

RETA D. MILLER, and WARREN D. MILLER,
MARCIA M. MILLER, Minors, by Reta D.
Miller, Guardian,

Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a foreign corporation,

Defendant.

JUDGMENT ORDER

The above entitled action came on regularly for trial, on the 20th day of January, 1942, on the issues, and in accordance with the Pre-Trial Order theretofore made and entered in said Court and cause, the plaintiffs appearing in person and by their attorneys, George Neuner and George Wm. Neuner, the defendant appearing by its attorneys, W. M. Huntington and Roland Davis, of Huntington, Wilson & Davis. The jury was regularly

empaneled and sworn to try said action, witnesses on the part of the plaintiffs and defendant respectively were sworn and examined, forms of verdict were agreed upon by the respective parties, and approved by the Court. After hearing the evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and returned into Court the following verdict, in words and figures, omitting title, as follows:

“We, the jury duly empaneled in this action, find in favor of the plaintiffs and assess the sum of \$1000.00 as attorney’s fees in this action.

“Dated January 21, 1942.

FRANK TAYLOR
Foreman” [43]

It Is Therefore Ordered, Adjudged and Decreed that the policies of insurance numbered 17 395 774 and 17 395 775, issued by the above named defendant upon the life of Warren L. Miller and described in the Pre-Trial Order herein were in full force and effect at the time of the death of insured on December 3, 1940.

It Is Further Ordered, Adjudged and Decreed that plaintiff, Reta D. Miller, have and recover judgment from New York Life Insurance Company, defendant above named, for the sum of \$420.00 covering 14 monthly installments of \$30.00 each, covering the period from December 3, 1940 to

January 3, 1942, both inclusive, now payable to said plaintiff under the terms of policy numbered 17 395 774, described in the first cause of action herein, with interest computed at the rate of 6% per annum on each \$30.00 monthly installment from its due date to date of payment; for the further sum of \$3,000.00 covering the amount payable by reason of the double indemnity provisions in said policy with interest thereon at the rate of 6% per annum from December 3, 1940 until paid; for the further sum of \$280.00 covering 14 monthly installments of \$20.00 each, covering the period from December 3, 1940 to January 3, 1942, both inclusive, now payable to said plaintiff under the terms of policy numbered 17 395 775, described in the second cause of action herein, with interest computed at the rate of 6% per annum on each \$20.00 monthly installment from its due date to date of payment; for the further sum of \$2,000.00 covering the amount payable by reason of the double indemnity provisions in said policy last described with interest thereon at the rate of 6% per annum from December 3, 1940 until paid; for the further sum of \$1,000.00 attorney's fees with interest thereon at the rate of 6% per annum from date hereof until paid and for costs and disbursements incurred herein and hereby taxed at \$.....

All Done and Dated this 28th day of January, 1942.

CLAUDE McCOLLOCH
District Judge

[Endorsed]: Filed January 28, 1942. [44]

And Afterwards, to wit, on the 28th day of January, 1942, there was duly Filed in said Court, a Cost Bill, in words and figures as follows, to wit: [45]

[Title of District Court and Cause.]

COST BILL

Statement of Costs and Disbursements claimed by Plaintiffs in the above entitled action:

Clerk's fee, filing complaint.....	\$10.00
United States Marshal, service fee.....	2.06
Reporter fee and transcript of pretrial.....	26.35
To jury Bailiff, $\frac{1}{2}$ charge for jury lunch.....	4.20
Attorneys' fee—prevailing	10.00
Witness fees:	
B. G. Skulason, 1 day.....	2.00
Arthur Lewis, 1 day.....	2.00
	Total.....
	\$56.61

State of Oregon

County of Multnomah—ss.

I, George Neuner, being first duly sworn, say that I am one of the attorneys for plaintiffs in the above entitled cause, and except fees of officers, the disbursements set forth in the above have been necessarily incurred by the plaintiffs, who are entitled to recover the same from the defendant. That the witnesses above named were each necessary and material in the trial of said cause, and attended

the trial thereof at the request of plaintiffs as witnesses, only, in said cause.

GEORGE NEUNER

Subscribed and sworn to before me this 27th day of January, 1942.

[Notarial Seal] GEORGE WM. NEUNER

Notary Public for Oregon

My commission expires October 12, 1942.

[Endorsed]: Filed January 28, 1942. [46]

And Afterwards, to wit, on the 30th day of January, 1942, there was duly Filed in said Court, a Motion for Judgment Notwithstanding the Verdict or for New Trial in words and figures as follows, to wit: [47]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT, OR FOR A NEW TRIAL

Comes now the defendant and moves the court for an order setting aside the verdict of the jury received in the above entitled case and the judgment order entered thereon and entering judgment in the above entitled case in favor of defendant, in accordance with the motion of defendant heretofore made herein for an order directing the jury to return a verdict in favor of defendant.

This motion is based upon the grounds and for the reasons as follows:

1. There was no evidence that the premiums due on October 17, 1940, on the policies of insurance involved in plaintiff's causes of action were paid when due or during the grace period, or at all.

2. There was no evidence that the defendant agreed to accept, or did accept, the check dated November 17, 1940, payable to the order of the defendant as absolute or unconditional payment of the premiums due October 17, 1940, on said policies of insurance.

3. There was no evidence of a waiver of the provisions of the policies of insurance involved in plaintiffs' causes of action with respect to the payment of premiums. [48]

In the event the court denies the above motion then defendant moves the court for an order setting aside the judgment order described above and granting a new trial in the above entitled case upon the grounds and for the reasons as follows:

1. The court erred in receiving in evidence plaintiffs' pre-trial Exhibits 6, 8a and 8c.

2. The court erred in receiving testimony over defendant's objections relative to plaintiffs' pre-trial Exhibits 6, 8a and 8c.

3. The court erred in receiving testimony over defendant's objections to transactions the witness A. E. Yount had with Warren L. Miller.

4. The court erred in receiving testimony over defendant's objections relative to matters occurring prior to the receipt by defendant of the check dated November 17, 1940.

5. The court erred in receiving testimony over defendant's objections relative to matters occurring subsequent to the mailing of plaintiffs' Exhibit No. 3 returning the check to the insured.

6. The court erred in submitting the case to the jury on any issue of fact.

7. The court erred in failing to give defendant's requested instructions 3, 4, 5, 6, 7, 8 and 9.

8. The court erred in instructing the jury with reference to the acceptance of the check as payment in failing to distinguish between conditional payment and absolute or unconditional payment; the instructions by the court with respect to "intention" as to payment were confusing and misleading and were not a correct and accurate statement of the law.

9. The court erred in submitting to the jury the question of Mr. Durham's authority, in that the uncontradicted evidence showed that Mr. Durham had no authority to accept the [49] check as unconditional payment or to waive any of the company's rights or requirements.

HUNTINGTON, WILSON &
DAVIS

Attorneys for Defendant
ROLAND DAVIS
Of Attorneys for Defendant
514 Porter Building
Portland, Oregon

Please Take Notice that the foregoing motions

will be placed upon the motion calendar for February 16, 1942.

ROLAND DAVIS

Of Attorneys for Defendant

[Endorsed]: Filed January 30, 1942. [50]

And Afterwards, to wit, on the 20th day of April, 1942, there was duly Filed in said Court, a memorandum Opinion in words and figures as follows, to wit: [51]

[Title of District Court and Cause.]

MEMO DENYING JUDGMENT NOV AND
NEW TRIAL

The question of the extent of defendant cashier's authority was not briefed before trial, and I desired to consider it further. My feeling that this was a jury question is strengthened by the recent opinion in this Circuit of New York Life Insurance Company v. Lois Rogers, decided March 16, 1942. Defendant's motion for judgment notwithstanding the verdict or for a new trial is therefore denied.*

Dated this 20th day of April, 1942.

CLAUDE McCOLLOCH,
Judge.

*Note—Since this case has been so well briefed and argued, I hope at a later date to file a memo-

random setting forth the contentions of the parties with authorities and the conclusions reached at the trial.

C. McC.

[Endorsed]: Filed April 20, 1942. [52]

And Afterwards, to wit, on Tuesday, the 5th day of May, 1942, the same being the 56th Judicial day of the Regular March, 1942, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [53]

[Title of District Court and Cause.]

**ORDER DENYING MOTION FOR JUDGMENT
NOTWITHSTANDING VERDICT OR FOR
A NEW TRIAL.**

The Motion for Judgment Notwithstanding Verdict or for a new trial, filed by the defendant in the above entitled court and cause came on for hearing on the 20th day of February, 1942, the plaintiff appearing by her attorneys, George Neuner and George Wm. Neuner, the defendant appearing by its attorneys, Huntington, Wilson & Davis, and after hearing the argument of counsel, the court took said matter under advisement, and now being fully advised in the premises, it is hereby

Ordered that said Motion for Judgment Notwithstanding Verdict or for New Trial, be, and the same hereby is denied.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed May 5, 1942. [54]

And Afterwards, to wit, on the 13th day of July, 1942, there was duly Filed in said Court, a Notice of Appeal in words and figures as follows, to wit:

[55]

[Title of District Court and Cause.]

Notice Is Hereby Given that New York Life Insurance Company, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above entitled court and cause on January 28, 1942, and from the whole thereof.

Dated this 13th day of July, 1942.

W. M. HUNTINGTON,
ROLAND DAVIS,
Attorneys for Appellant, New
York Life Insurance Com-
pany, 514 Porter Building,
Portland, Oregon.

[Endorsed]: Filed July 13, 1942. [56]

And Afterwards, to wit, on the 16th day of July, 1942 m, there was duly Filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[57]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents, That we, New York Life Insurance Company, a corporation, as Principal, and Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, with its head office in the City of Baltimore, Maryland, as Surety, are held and firmly bound unto Reta D. Miller and Warren D. Miller, Marcia M. Miller, Minors, by Reta D. Miller, their guardian, in the full and just sum of Ten Thousand Dollars (\$10,000), to be paid to the said Reta D. Miller and Warren D. Miller, Marcia M. Miller, Minors, by Reta D. Miller, their guardian, their executors, administrators or assigns, to which payment well and truly to be made we bind ourselves and our successors jointly and severally by these presents.

Whereas, lately at a District Court of the United States for the District of Oregon in an action pending in said court between Reta D. Miller and Warren D. Miller, Marcia M. Miller Minors, by Reta D. Miller, their guardian, as plaintiffs, and New York Life Insurance Company, a corporation, as Defendant, a judgment was renrerred against the said New York Life Insurance Company, and the said New York Life Insurance Company hav-

ing filed in said court a Notice of Appeal to reverse the judgment in the aforesaid [58] action on appeal to United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals.

Now the condition of the above obligation is such that if said New York Life Insurance Company shall prosecute its appeal to effect and satisfy the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, we have hereunto set our hands this 13th day of July, 1942.

NEW YORK LIFE INSUR-
ANCE COMPANY,
a corporation,
By R. A. DURHAM,
Its Attorney-in-Fact,
Principal
(Seal Fidelity & Deposit Company)
FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,
a corporation.
By CLARENCE D. PORTER,
Its Attorney-in-Fact,
Surety

The within and foregoing bond is approved as to amount, sufficiency and form, and is hereby allowed as a Superseadeas this 15th day of July, 1942.

C LAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 16, 1942. [59]

And Afterwards, to wit, on the 27th day of July, 1942, there was duly Filed in said Court, a Designation of Record on Appeal, in words and figures as follows, to wit: [60]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The defendant, New York Life Insurance Company, in accordance with Rule 75 of the Federal Rules of Civil Procedure, hereby designates the complete record, proceedings, and evidence in the above entitled cause to be contained in the record on appeal.

HUNTINGTON, WILSON &
DAVIS,

(sgd) W. M. HUNTINGTON,

(sgd) ROLAND DAVIS,

Attorneys for New York Life
Insurance Company, Appel-
lant, 514 Porter Building,
Portland, Oregon.

State of Oregon,
County of Multnomah—ss.

I hereby certify that on the 25th day of July, 1942, I placed a true, full and correct copy of the foregoing Designation of Record on Appeal in an envelope addressed to George Neuner, Attorney-at-Law, McMinnville, Oregon, who is one of the attorneys for plaintiffs' appellees, and said envelope with first-class postage thereon fully prepaid was deposited by me in the United States mail on said 25th day of July, 1942.

ROLAND DAVIS,
Of Attorneys for Appellant.

[Endorsed]: Filed July 27, 1942. [61]

And Afterwards, to wit, on Wednesday, the 12th day of August, 1942, the same being the 33rd Judicial day of the Regular July, 1942, Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [62]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND
DOCKET APPEAL WITH APPELLATE
COURT

It appearing to the Court that the time to file and docket the appeal of the above entitled cause in the

Appellate Court has not expired, upon application of the Appellant,

It Is Hereby Considered, Ordered and Adjudged that the time within which Appellant may file and docket its appeal of the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit be and it is hereby extended to and including the 22nd day of September, 1942.

Dated this 12th day of August, 1942.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed August 12, 1942. [63]

And Afterwards, to wit, on the 15th day of August, 1942, there was duly Filed in said Court, a Stipulation of Contents of Record on Appeal, in words and figures as follows, to wit: [64]

[Title of District Court and Cause.]

STIPULATION OF CONTENTS
RECORD ON APPEAL

It Is Hereby Stipulated by the Appellant and Appellees by their respective attorneys of record that the record on appeal in the above entitled cause shall include the following documents and exhibits and no others, to-wit:

1. Amended Complaint
2. Answer

3. Demand for Trial by Jury
4. Pre-Trial Order
5. Jury Verdict
6. Judgment Order
7. Transcript of Testimony
8. All Exhibits
9. Cost Bill
10. Motion for Judgment Notwithstanding Verdict, or for a New Trial
11. Memorandum Denying Judgment NOV and New Trial
12. Order Denying Motion for Judgment Notwithstanding Verdict or for a New Trial
13. Notice of Appeal
14. Bond on Appeal
15. The Designation of Record on Appeal
16. This Stipulation of Contents Record on Appeal

Dated this 8th day of August, 1942.

GEORGE NEUNER,
Of Attorneys for Appellees.
ROLAND DAVIS,
Of Attorneys for Appellant.

[Endorsed]: Filed August 15, 1942. [65]

CERTIFICATE OF CLERK TO
TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 65 inclusive, constitute the transcript of record on appeal from a judgment of said Court in a cause therein numbered Civil 779, in which Reta D. Miller, and Warren D. Miller, Marcia M. Miller, minors, by Reta D. Miller, Guardian, are plaintiffs and appellees, and New York Life Insurance Company, a foreign corporation, is defendant and appellant; that said transcript has been prepared by me in accordance with the designation and the stipulation of contents of the record on appeal filed therein by appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the said designation and stipulation.

I further certify that I am transmitting with said transcript, the duplicate of the reporter's transcript filed in the Clerk's office, together with the dupli-

cate of the exhibits Nos. 1, 2, 3, 3-a, 4, 5, 6, 7, 8-a, 8-c, 10, 11, 12, 13, 14, 15, 21, and 22, being all of the exhibits received in evidence at the trial.

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$9.75 for comparing and certifying the within transcript, making a total of \$14.75 and that the same has been paid by the said appellant.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 15th day of September, 1942.

[Seal]

G. H. MARSH,

Clerk. [66]

[Title of District Court and Cause.]

TESTIMONY

Portland, Oregon,
Tuesday, January 20, 1942.

10:00 o'clock A. M.

Before: Honorable Claude McColloch, Judge, and
a jury.

APEARANCES:

Messrs. George Neuner and George Wm. Neu-
ner, Attorneys for the Plaintiffs;

Messrs. Huntington, Wilson & Davis (by
Messrs. W. M. Huntington and Roland
Davis), Attorneys for the Defendant.

TRIAL PROCEEDINGS

The Court: Ready?

Mr. Neuner: Yes. [1*]

The Court: Ready, Mr. Davis and Mr. Hunting-
ton?

Mr. Davis: Yes.

Mr. Neuner: If your Honor please, some ques-
tion was raised here during the argument and pre-
trial in this case relative to the question of waiver
in this matter, and I observe from counsel's re-
marks made during the proceedings that no founda-
tion was laid in the pleadings. In order to avoid
any possible contingency in that regard, while we

*Page numbering appearing at top of page of original Reporter's
Transcript.

believe that the allegation that the policies were in full force and effect on that date would probably cover it, and we have some authority to that effect, nevertheless, we would like to amend Section V on page 3 of the amended complaint by substituting this paragraph for the Paragraph V:

“That thereafter the said Warren L. Miller continued to pay the quarter-annual premiums upon said policy quarterly and in advance according to the terms and conditions thereof, including the quarterly premium due on July 17, 1940. That on November 13, 1940 said Warren L. Miller gave to defendant a check dated November 17, 1940 in payment of the premium due October 17, 1940. That the defendant accepted said check on November 13, 1940 as full payment of the said premium referred to, due October 17, 1940. That said policy remained and was in full force and effect on the 3rd day of December, 1940.”

And we likewise offer the same amendment to Paragraph III on page 6 of the amended complaint, of the second cause of [2] action, to avoid any possible question as to the pre-trial order setting forth the contention of plaintiff that the terms and conditions of the policies had been waived by reason of the acceptance of this check.

The Court: I can hear you at recess or now, as you please.

Mr. Davis: Well, if the Court please, we think, if this amendment is to be allowed—of course, we

are objecting to it—that we should have some further pre-trial conference to ascertain what he is claiming in regard to this, so that we may be able to meet it.

The Court: We will adjourn to chambers. Just have the jury remain in the room.

(Thereupon the Court, counsel and the court reporter retired to the Court's chambers, where the following occurred without the presence of the veniremen:)

Mr. Davis: For the purpose of the record, we would object to allowing the amendment at this time, after the pre-trial order has been made and entered and the parties have prepared their cases on the basis of the pleadings as they were and upon the pre-trial order. We further object to the amendment, or to that portion of the amendment, as follows: "That the defendant accepted said check on November 13, 1940 as full payment of the said premium referred to, due October 17, 1940", on the ground that the pleading is a conclusion. If the plaintiffs claim that the check was accepted on that date as uncon- [3] ditional payment, then we think that they should allege the facts which they claim constitute an acceptance.

The Court: I will allow the amendment and the defendant may make appropriate amendments to its pleading at any time during the trial, and an exception is allowed to the defendant.

Mr. Davis: Now we would like to know, before we go into the trial, just what the plaintiffs claim

for this and what they are relying upon, the same as they should prior to the pre-trial order.

The Court: You mean what they claim for the amendment?

Mr. Davis: Yes; and what acts they claim constituted what they say is full payment or acceptance.

Mr. Neuner: We claim, your Honor, nothing different than the proceedings had in pre-trial conference. It has been our contention all the way through that the check was delivered on the 13th of November, 1940, to the cashier of the defendant, at its branch office in the City of Portland, Oregon, and that by that delivery to the defendant and by its conduct and dealings with reference to the check, that the insured was led to believe honestly that his insurance was in effect, and that by reason thereof, by the acceptance of that check, which was in the custody of the defendant from the 13th until it was returned on the 26th, constituted an acceptance and thereby was full payment of the premiums on both policies.

Mr. Davis: Do I understand that you are not claiming that [4] there was an agreement to accept the check?

Mr. Neuner: That is a matter that might be inferred from the facts and circumstances, conduct and dealings in connection with the acceptance and the holding of the check. I can't prove an express agreement, but there is evidence of an implied agreement.

Mr. Davis: There is evidence of what?

Mr. Neuner: There probably will be evidence of an implied agreement. That is inferred from the transactions themselves.

Mr. Davis: Well, do I understand that you claim that the handing over of the check to the cashier and his leaving it in his office from the 13th to the 18th and then entering it on his books constitutes an implied agreement?

Mr. Neuner: That is a question I am not concerned with. When we delivered the check and the check was delivered to the defendant we claim that there was an acceptance of the check.

Mr. Davis: I know. I am trying to get your position now, as to whether you are going to rely upon an agreement or implied agreement. If you are relying on an implied agreement or an agreement I want to know what facts you claim constituted such an agreement or implied agreement.

Mr. Neuner: I don't have to rely on an agreement to constitute payment. The position I am taking is that the check was accepted as payment of those premiums. Now whether there was an agreement, I am not concerned with it. [5]

Mr. Davis: I understand, Mr. Neuner, there are two positions you might take. One is that the facts here constituted an acceptance of the check, which apparently is the position you are taking. The other position is that there was an agreement made and entered into to accept the check. Now I want to eliminate one or the other.

Mr. Neuner: Well, I don't think you are entitled to have them eliminated. I think they are both in the case, and as far as that is concerned, by the acceptance of the check by the defendant you might infer that credit was extended. I am not concerned about that. What we are concerned with is that the check was accepted, and if it was accepted it created an obligation which didn't theretofore exist and paid the premiums on both policies.

Mr. Davis: Well, I still think that your positions are not exactly the same. One constitutes an agreement and the other the acts themselves. An agreement is where both parties are advised of the circumstances and act upon them. They enter into an agreement to accept the check as payment—

Mr. Neuner: Well—

Mr. Davis: —and I am trying to eliminate one.

Mr. Neuner: Yes. My witness is dead. He can't say what the agreement was there. I think you are unfair, Mr. Davis, on that proposition.

Mr. Davis: No. I think that we are entitled to know the posi- [6] tion that you are going to take.

Mr. Neuner: Well, I am taking the position, just as I have clearly stated, and I have stated it all the way through. Now if anyone wants to infer an implied agreement there to extend credit, that is in the case. I can't prove an agreement, an express agreement.

The Court: I think we had better go out, gentlemen.

Mr. Davis: There are one or two other questions here, I suppose by the words "full payment" here you mean unconditional payment?

Mr. George Wm. Neuner: I think the language there is "accepted as payment".

Mr. Davis: Well, you say "accepted as full payment".

Mr. George W. Neuner: Full payment merely negatives the idea there was any partial payment of it.

Mr. Davis: But you are not alleging that it was unconditional payment?

Mr. George Wm. Neuner: We allege it as payment. Payment is payment, Roland.

Mr. Davis: I see what you mean. Now there was this one other question. I probably should know the answer to this but I don't. In view of the admitted facts of the case, how far is the Court going to permit the parties to go into all of the questions?

The Court: Well, that comes up in connection with our pre- [7] trial procedure every now and then. I had a case the other day which ordinarily would have taken a week, I would say, before it unfolded itself in the old way of doing it, just going out and starting to try a case, but we had 125 or more exhibits in it, as I remember, and we got through in a day and a half. The case resulted in a directed verdict. But I can see some of the difficulties that the plaintiff had in that case. We had taken so many facts out of the case there was little local color left for him. And I imagine that is what

you have in mind here, whether we are going to have a recital from the witness stand by the widow of the death of her husband and the background of this thing. Isn't that what you—

Mr. Davis: Yes. Those are the things I have in mind.

The Court: —what you had in mind?

Mr. Davis: As to what we are going to do, because I take it that these admitted facts are part of the case and the purpose of the pre-trial order is to avoid unnecessary proof.

The Court: Now as we went along in that case I took the play away from the plaintiff's lawyer, if I could put it that way, and would say to him, "Now that is admitted", and delineate it to the jury, that at previous meetings, before they were called, certain facts had been admitted.

Mr. Neuner: There is no desire, I might say, on my part, to go into any extended detail. I think there are some questions there that probably a jury would want to know about, [8] but not to rehash all the admitted facts.

Mr. Davis: It seems to me under the admitted facts there is very little testimony to be taken.

Mr. Neuner: Well, there are a few things that I think would enlighten the matter. For instance, I raised the question at pre-trial, I am going to ask her what her husband told her about this insurance.

Mr. Davis: Of course you understand there will be an objection.

Mr. Neuner: Of course I expect that; I would be surprised if there wasn't; but that goes to the question of intention and good faith. It has nothing to do probably with the technical propositions that—

The Court: What answer do you expect from her? I remember that was mentioned at pre-trial, but what will she say?

Mr. Neuner: I expect her to say that he told her that he had paid the insurance; that he had given a note for little Warren's insurance and some parley took place which may not be material, and she asked him why—

The Court: Why what?

Mr. Neuner: He gave a note. He said he wanted to be sure that their insurance was kept in force.

Mr. Davis: You mean the children's?

Mr. Neuner: No; this insurance.

Mr. Davis: He didn't say that he gave a note to pay this? [9]

Mr. Neuner: No; he gave a note for little Warren's but he gave the check. From the layman's attitude you can readily understand why he would make a statement of that kind.

The Court: When did he tell her that? That night?

Mr. Neuner: I think it was either that day or the next day.

The Court: How did it come up? Does she remember who brought it up?

Mr. Neuner: Well, the soliciting agent on the 13th came to the house—

The Court: Is that the day he gave the check?

Mr. Neuner: Yes.

The Court: Before he went out in the field he came by the house?

Mr. Neuner: And asked for Warren.

The Court: Asked for the deceased?

Mr. Neuner: No. He asked for—yes, the deceased, and she told him he was plowing over in an adjoining place, and he went over there, and I assume that naturally when he came in that night or the next morning something was said about that, and that is when he made this statement.

The Court: What is your authority for the admissibility of that? I remember we discussed that.

Mr. Neuner: My authority is that it is a verbal act showing intention as to what the deceased did, or intended to do—in this case what he did—and it is an exception to the hearsay [10] rule. It was first approved by our Supreme Court in *State v. Farnam*; it was next approved in this celebrated—

The Court: Brumfield case?

Mr. Neuner: No, no.

Mr. Davis: McCredie?

Mr. Neuner: Yes; the Wigfall case.

Mr. Davis: That wasn't such a conversation as this. That conversation related to the cause of his death, and that is the exception in the hearsay rule.

Mr. Neuner: Well, so is this. It is also in New

York Life Insurance Company v. Mason, in 272 Fed. 28. It goes along the line of verbal acts, intention, and Wigmore lays it down as an exception to the hearsay rule.

The Court: 272 Fed. 28, and Wigmore is where? Have you got your citation?

Mr. Neuner: No, I haven't got it to Wigmore, but they all base it on Wigmore; 82 Oregon 211.

Mr. George W. Neuner: Wigmore is set out in the Farnam case. I believe it is.

Mr. Huntington: What is that, 82 Oregon, the Farnam case?

Mr. Neuner: Yes.

The Court: What is the Wigfall case?

Mr. Neuner: I think Security Savings & Trust Company v. Commercial Casualty Insurance, 147 Ore. 195.

The Court: Is that the Wigfall-McCredie case?

[11]

Mr. Neuner: Yes, that is it.

The Court: What do you claim is the distinction?

Mr. Davis: I haven't read those other cases, but the Wigfall case involves the question of the cause of his death, and that is the exception to the hearsay rule and it is provided by the Oregon statute.

The Court: What does the Oregon statute say?

Mr. Davis: That the dying declaration is admissible as to the cause of death. And the whole question in the McCredie case, and in one case prior to that, was whether or not the exception would

be extended to civil cases. Prior to that time it had only been permitted in criminal cases, such as probably your Farnam case. I don't know what the Farnam case is.

Mr. Neuner: The Farnam case was the pioneer in that.

Mr. Davis: But it does not extend it to other civil matters or matters not connected with the death. That is my understanding of it.

Mr. Neuner: No. It is an exception to the hearsay rule and it has nothing to do with dying declarations.

The Court: What is the exception?

Mr. Neuner: In the Farnam case, of course that was a criminal case, the question came up in this way: There were two witnesses that were visiting with the deceased on the afternoon prior to her death. These two girls wanted the deceased to go home with them that night. [12]

Mr. Davis: I remember that case.

Mr. Neuner: She says, "Wait until the mail comes." They waited. The mail came along, the mail carrier handed her a note, she tore it up, and she says, "No, I can't go, girls. Roy is coming down tonight." Now there was the question. It wasn't a dying declaration because there was no impending death at that time.

The Court: Go get me that section of Wigmore.

Mr. Neuner: I think it is 1702 or 1736, I don't know.

The Court: The last edition.

Mr. Neuner: And of course they believed that. Judge Skipworth, in the first murder case that he tried, said he was inclined to sustain the objection. Mr. Rice and I maintained it was a very important piece of testimony and that we would like to be heard. We took up the rest of the afternoon and the next day, and the judge came out and overruled the objection.

Mr. Davis: Didn't they permit that on the basis of the question of her intent to go to a certain place?

Mr. Neuner: Well, it showed the mental attitude, the plan, the intention.

Mr. Huntington: As to something that happened in the future?

Mr. Neuner: Yes, but I don't think that makes any difference.

Mr. Huntington: Well, that distinguishes it against a declaration in his own interest. [13]

Mr. Neuner: Oh, no. We have authorities in there; if the Court wants to take up the time we will get them.

The Court: We will have to take it up sooner or later and we will be right up to it about your first witness, I would think, and it is an important question. If it is inadmissible and was so held by the Circuit, should you get a verdict, it is very important to you, and it is important to me as a matter of principle.

Mr. Neuner: Yes. Well, I want the Court to understand if I am wrong I don't want to urge anything that is not right.

Mr. Davis: You claim, even if this is admissible, it establishes his intent to what?

Mr. Neuner: To honestly believe that his premiums had been paid on these policies and the policies were in full force and effect.

Mr. Davis: Well, I don't think it goes any further than to say that he gave a check in payment of it.

Mr. Neuner: That is true. I don't claim they were—that that spells that the money was received on the check.

Mr. Davis: I think that is the only thing that the statement would be worth, and certainly it would be a self-serving declaration.

Mr. Neuner: No.

Mr. Huntington: It is admitted that he gave the check. You don't need to prove that. [14]

Mr. Davis: That is all it is. But it is alleged he gave the check and it is admitted.

Mr. George W. Neuner: I have two places on that, your Honor.

The Court: Just write it down.

Mr. Neuner: It resolves itself back to the same question—he gave the check, and that he intended to pay his premiums. Now that is the whole sum and substance of it.

Mr. Davis: Of course if a man gives a check for the amount of the premiums to the company, it is apparent that he gave that check with that intent, but still the law comes back that a check is not absolute payment. It is taken conditional upon the

check being honored when presented. So you have got to go further than that, it seems to me, if you are going to rely upon anything that he said or did to show more than that he just actually handed the check over.

Mr. Neuner: That is all——

Mr. Davis: And that is all this conversation amounts to.

Mr. Neuner: That is all we can show, that he intended to pay his premium and that he gave his check in payment of it.

The Court: I don't know whether it will be practicable from the evidence but it will help me to inject this into the discussion. I assume from what I have heard of this case this man thought he had money in the bank all the time to cover that?

Mr. Neuner: Surely. [15]

The Court: As I remember his check stubs, they showed he had an amount of balance to his credit.

Mr. Davis: We are not going to agree that check stub is correct or was made out by him, or was made out then.

The Court: I am glad to have your statement on this.

Mr. Davis: We are not going to agree to that. Now this is outside of the record, but we do know that this man has had a habit of giving NSF checks, and anybody that does that quite often you can't say that he thought he had money in the bank to meet the check when the check was drawn.

The Court: And as long as you have made the

point, you question that those check stubs are in his handwriting?

Mr. Davis: Yes, I question that, and I question when the entries were made. We haven't anything on that at all.

The Court: Do you expect to offer the check stubs?

Mr. Neuner: Yes. Your Honor will recall that he wanted to see them and so I put them in.

The Court: Yes, they are identified but they are not in the case yet.

Mr. Neuner: No. We intend to introduce them.

The Court: You intend to introduce them?

Mr. Neuner: That goes to the question, your Honor, again, of good faith and that he intended to have the money there.

The Court: I will tell you how my mind is running: that this is not a good faith case, as I see it; it is a contract [16] case, and it takes two parties to make a contract, and you claim payment by acceptance of the check?

Mr. Neuner: Yes.

The Court: Well, if that question goes to the jury, just as that old Chicago judge instructed, I don't see how what he said could be improved on; I don't know whether he is old either—Miller had to think he was giving the check in payment, and the company by its conduct, at least—you don't have to claim any express understanding on their part—had to so conduct itself as to warrant the inference that it thought and intended that it was accepting

the check in payment. Now then, so far as Miller's part in it is concerned, that conduct seems to me is material. Naturally if Mr. Davis could show that those entries were not made in his handwriting and were made by somebody else afterwards in order to prepare for this case, then that is another story.

Mr. Davis: We don't know that they are made in somebody else's handwriting. We are not claiming that.

Mr. Neuner: What do you claim for that? Fraud?

Mr. Davis: No.

The Court: He just says he doesn't know.

Mr. Davis: We don't know.

The Court: He is not going to admit the signature, or that the writing was made at the time.

Mr. Neuner: You can't put me on the stand and have me swear [17] it was his handwriting. I don't know.

The Court: His wife knows.

Mr. Neuner: Yes, his wife knows.

Mr. Davis: Does she know when those entries were made?

Mr. Neuner: No. I don't know.

Mr. Davis: I think, to be admissible, those entries would have to have been made there at the time it occurred.

Mr. Neuner: I don't think so.

The Court: You would have to prove they were in his handwriting, however.

Mr. Neuner: Oh, yes, we would have to prove that.

The Court: You haven't inquired of her as to that?

Mr. Neuner: No. As I say, I don't consider that important.

Mr. Davis: Our position there is, of course, it doesn't make a bit of difference what he intended or thought; even though he thought he had money in the bank, it was his duty to have money in the bank when this check was presented, and sufficient money in the bank to honor the check.

Mr. Neuner: Well, of course that is disputable—his duty to have it there. Of course his honor would imply that he would have it there when he gave the check. But the presumption that obtains is the money wasn't in the bank.

Mr. Davis: But it wasn't there when the check got there.

Mr. Neuner: That is right.

Mr. Davis: And that is the reason that the law is that a [18] check is taken only conditionally—

Mr. Neuner: Oh, no; not a post dated check. You are right as to a currently dated check.

Mr. Davis: Even under the Oregon law a note is not unconditional payment; that is conditional; and unless the note is paid at maturity the original debt is not paid.

The Court: We have gone all over that before, and I suppose I will have to face that on the instructions, or on some phase of the case—these questions you are discussing now. Now on this question of his statement made and how many hours after he

saw this fellow in the field, that was in the early afternoon this man went out in the field, wasn't it?

Mr. Neuner: Yes; between one and two o'clock.

The Court: You are not sure as to when she claims he made this statement to her; probably at the earliest when he came in for supper?

Mr. Neuner: That would be about it.

The Court: And I see another difficulty about that, I think, that warrants consideration; permitting her to relate his statement that he had paid the premium. Now I know that is the way the ordinary man would put it, of course, that "I paid the premium", when he gave a note; but that is so much an ultimate fact which is for the jury in the case I think there is some real danger in throwing a statement like that into the case. I will rule on it of course if you put it up to me, but I don't [19] want her to get on there blurting out something that the Circuit may say, as they do in the war risk cases, was for the jury to decide. This Circuit has been particularly severe about permitting a statement before a jury in the nature of—

Mr. Neuner: Invading the province of the jury?

The Court: That is right. I myself am a rebel about the restrictive rules of evidence but I haven't had any luck with this Circuit.

Mr. Neuner: As I say, the only question we contend for that, and we limit it to that, was the intention.

The Court: I think if that widow testified when he came in that night he told her that he had given

this man, this agent a note for the little one's insurance, the new policy, and he had given him a check for the premium on the other one, in the first place I don't see that it adds anything to the case from your point of view. It is an admitted fact that he gave this man a check and that he gave him a note. But I think if she goes on there and says when he came in that night he told her he had paid the premiums on the two outstanding policies, or the older policies, that he had paid them by giving a check, I think a serious question is presented.

Mr. Neuner: I don't know whether he said by check. I think he said, "I paid that and I gave them a note on the other."

The Court: Well, I will ask you not to raise that question with her until I have ample time to look it up and look over [20] the authorities today anyhow.

Mr. Davis: That is going to be probably one of his first witnesses, isn't it?

The Court: I just asked him to be sure not to ask her that question.

Mr. Davis: With the opening statements probably we won't get to it this forenoon.

The Court: I want the noon hour to think of it and I want to fix my mind. You will expect the answer, if you ask the question, either that he paid it or paid it by giving a check?

Mr. Neuner: Yes, sir.

The Court: One or the other?

Mr. Neuner: Yes.

The Court: Stay away from that until after the noon hour, so I will have the noon hour to look into

it. Did you have some authorities you wanted me to put down on that? I have just written their cases here on that.

Mr. Neuner: To submit my case I will have to call some attorneys as to attorneys' fees, unless we agree on it.

The Court: Suppose you discuss that later. We can use the time now to better advantage. Let me tell you something now, before you leave this evidence question. We have also a statute that is presented to us here quite often that a deceased's statements are admissible on any question raised against him or his estate by an adversary. [21]

Mr. Huntington: In a case where his administrator is a party.

The Court: You are correct.

Mr. Huntington: And that does not apply in this case.

The Court: You are correct. It is limited just as you say.

Mr. Huntington: Yes.

The Court: There is considerable discussion of that by Wigmore.

(After further discussion in re authorities, etc., the Court, counsel and the court reporter returned to the court room, and thereupon the following proceedings were had:)

A jury was empaneled and sworn, and an opening statement was made by Mr. George Neuner in behalf of the plaintiffs.

The Court: Since it so near noon I won't ask Mr. Davis to break his statement. I will put off his statement until after the recess. Gentlemen of the jury, kindly, as in all cases, do not discuss the case among yourselves, nor permit it to be discussed in your presence until it is finally submitted. If you will please come back at one thirty we will proceed with the case.

(Thereupon at 11:53 o'clock A. M. a recess was taken until 1:30 o'clock P. M. of this day, Tuesday, January 20, 1942, at which time Court reconvened pursuant to the recess and the following further proceedings were had herein:)

An opening statement was made by Mr. Davis in behalf [22] of the defendant, and thereupon evidence was given as follows:

PLAINTIFFS' EVIDENCE

R. A. DURHAM

was produced as a witness in behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: May I have your correct name for the reporter?

The Witness: R. A. Durham.

Mr. Neuner: We are calling Mr. Durham, your Honor, as an adverse witness.

(Testimony of R. A. Durham.)

By Mr. Neuner:

Q. You are the cashier of the New York Life Insurance Company? A. Yes, sir.

Q. How long have you been in that capacity?

A. I have been cashier here in Portland about nineteen years.

Q. In charge of the branch office?

A. How?

Q. In charge of the branch office of the New York Life Insurance Company?

A. Well, in charge of the part that the cashier is in charge of; that is the clerical force.

Q. I wish you would just briefly narrate to the jury what the duties of the cashier are in connection with the office.

A. Well, I have charge of the office force. Our work is to collect premiums and transact different matters that come up with [23] policyholders and with our agents.

Q. Do you have in your possession the official premium receipts?

A. They are in the office.

Q. You are the custodian of them?

A. Well, there is about nineteen people in the office there under me. I don't personally handle those receipts.

Q. Well, they are issued by you, are they not, when premiums are paid?

A. Well, I am responsible for them.

(Testimony of R. A. Durham.)

Q. And when a premium is paid what do you do with reference to the official receipt.

A. When the premium is paid the clerk who takes the money signs the receipt and gives it to the person who pays it.

Q. And the clerk that does that is under your immediate direction? A. Yes.

Q. And this, I understand it, this procedure is common and generally followed; that is, immediately upon a premium payment a receipt is issued?

A. Yes. We have a great many transactions every day, people coming in there and paying their premiums.

Q. And you receive some by mail, do you?

A. Yes. We probably receive more remittances in the mail than we do right in the office.

Q. Generally by check?

A. Mostly by check or money order, I don't know which. [24]

Q. And on receipt of these checks the official receipt is immediately mailed?

A. Well, if the premium is paid in full and everything is all right about it.

Q. Well, what I am getting at is this: Now if I send you my check in payment of a premium you receive that check tomorrow, you mail that receipt, or do you wait until the check is returned to see whether it is good or not before you issue the official receipt?

(Testimony of R. A. Durham.)

A. No, we don't wait to find out if this check is good before we mail the receipt. If we received a remittance from somebody today we might not get at that maybe until the next day.

Q. I know. Well, that is what I meant.

A. In due course.

Q. Yes.

A. It depends on how much work there is.

Q. But the general policy is that on receipt of the check the receipt goes forward in acknowledgment thereof?

A. Yes; if the premium is paid within the grace period and is paid in full.

Q. Were you acquainted with Warren L. Miller during his lifetime? A. I don't believe so.

Mr. Neuner: May I have these exhibits, please.

Q. Do you know whether Warren L. Miller had a policy with your company? [25]

A. I am satisfied he did.

Q. Well, I hand you herewith the two life insurance policies, being Plaintiffs' Pre-Trial Exhibits 1 and 2, and ask you to peruse them and state whether or not you know what they are.

Mr. Davis: If the Court please, I think this is for the purpose of identifying and admitting these policies. These have all been identified in the pre-trial order. I don't think it is necessary to go through all this procedure.

The Court: You admit that those are the policies?

(Testimony of R. A. Durham.)

Mr. Davis: We have admitted that in the pre-trial order.

The Court: I understand.

Mr. Davis: We have no objection to their introduction.

The Court: You have to communicate this information to the jury, so I am employing this device now. It is admitted, gentlemen of the jury, that these are the policies which were issued by the defendant company on the life of the deceased, the policies here in controversy in this case. They are admitted—you are offering them, Mr. Neuner?

Mr. Neuner: Yes.

The Court: They are admitted and will be given the same numbers as at pre-trial.

(The New York Life Insurance Company Policy No. 17,395,774 in the amount of \$3,000, issued to Warren L. Miller, so offered and received, having been previously marked Plaintiffs' [26] Pre-Trial Exhibit 1, was further marked "and trial"; and the New York Life Insurance Company Policy No. 17,395,775 in the amount of \$2,000, issued to Warren L. Miller, so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 2, was further marked "and trial".)

(Testimony of R. A. Durham.)

PLAINTIFFS' EXHIBIT No. 1

(Copy)

NEW YORK LIFE INSURANCE
COMPANY

A Mutual Company Founded in 1845 Agrees to Pay to Reta D., wife of the insured, or in event of her death, to Warren D. and Marcia M. Miller, children of the insured or to such of them as shall be surviving as the benefits hereunder severally become due and payable, share and share alike * * * Beneficiary (with right on the part of the insured to change the beneficiary in the manner provided herein) Three Thousand Dollars (the face of this policy) As Hereinafter Provided upon receipt of due proof, on forms prescribed by the Company, of the death of Warren L. Miller the Insured And, if such death occurs on or before the Seventeenth day of July 1954,

The Company Further Agrees to Pay to Said Beneficiary a Monthly Income of Thirty Dollars beginning as of the date of death of the Insured and terminating on the last Monthly Income date prior to the Eighteenth day of July 1954.

If due proof of the death of the Insured is received on or before the Seventeenth day of July 1954, the face amount of this Policy will be payable upon said date. If such proof is received after said date the face amount will be payable upon receipt thereof.

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

This contract is made in consideration of the application therefor and of the payment in advance of the sum of \$28.62, the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the Seventeenth day of October Nineteen Hundred and thirty-nine, and of a like sum on said date and every Three calendar months thereafter during the lifetime of the Insured until premiums for Fifteen full years shall have been paid, and of the payment of a reduced premium of \$24.96 every Three calendar months thereafter during the lifetime of the Insured.

This Policy shall take effect as of the Seventeenth day of July Nineteen Hundred and thirty-nine, which day is the anniversary of this Policy.

The Benefits and Provisions printed or written by the Company on the following pages are a part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In Witness Whereof the New York Life Insurance Company has caused this contract to be signed this Thirteenth day of July Nineteen Hundred and thirty-nine.

ALFRED L. AIKEN

President

FREDERICK M. JOHNSON,

Secretary

D. D. LURIE

Registrar

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

939-92 Fam. Inc. (15) O. L.

Age 33.

Examined JM cp

MB

Family Income—15 Year Period. Face Amount Payable at Death if Death occurs after the 15th Anniversary of this Policy; if Death occurs prior thereto, Monthly Income from Death to the 15th Anniversary of this Policy, when Face Amount is Payable. Premiums Payable during Lifetime unless Dividends Applied to Shorten Premium Paying Period. Premiums reduced at the 15th Anniversary. Annual Participation in Surplus. Disability Benefit. Accidental Death Benefit.

ACCIDENTAL DEATH BENEFIT

This Agreement is issued as a part of and attached to Policy No. 17 395 774 on the life of Warren L. Miller the Insured.

In Consideration of the payment in advance of an additional Quarter annual premium of \$1.98, which is included in and payable as part of the premium stated in said Policy and of the payment of a like sum as part of each premium after the first payable under said Policy,

New York Life Insurance Company Agrees to Pay to the beneficiary under said Policy, Three Thousand Dollars upon receipt of due proof, on forms prescribed by the Company, that the death of the Insured resulted directly and independently

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

of all other causes from bodily injury effected solely through external, violent and accidental means and occurred within ninety days after such injury and prior to the anniversary of said Policy on which the Insured's age at nearest birthday is 65 and prior to the maturity of said Policy; provided, however, that such Accidental Death Benefit shall not be payable if the Insured's death resulted, directly or indirectly, from (a) self-destruction, whether sane or insane; (b) the taking of poison or inhaling of gas, whether voluntary or otherwise; (c) committing an assault or felony; (d) war or any act incident thereto; (e) engaging in riot or insurrection; (f) operating or riding in any kind of aircraft, whether as a passenger or otherwise, other than as a fare-paying passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and operated by a licensed pilot on a regular passenger route between definitely established airports; (g) infirmity of mind or body; (h) illness or disease; or, (i) any bacterial infection other than that occurring in consequence of an injury on the exterior of the body effected solely through external, violent and accidental means.

The Company shall have the right and opportunity to examine the body and to make an autopsy unless prohibited by law.

The Accidental Death Benefit shall not apply to any Temporary Insurance or Paid-up Insurance

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)
provided in said Policy under "Surrender Values"
or to any dividend additions provided therein under
"Participation in Surplus—Dividends."

Any premium due on or after the anniversary
of said policy on which the * * * age of the Insured
at nearest birthday is 65 will be reduced by
the amount of premium included therein for the
Accidental Death Benefit. If for any reason said
reduction shall not be made and said amount shall
be paid to and received by the Company as a part
of any such premium, the amount overpaid with
interest at five per cent per annum thereon, will
be refunded and the Company shall not incur any
other or further obligation or liability.

Upon written request of the Insured on any anniversary
of said Policy and upon return of said Policy
and this Agreement for proper indorsement,
the Company will terminate this Agreement
and thereafter the premium shall be reduced by
the amount included therein for the Accidental
Death Benefit.

This Agreement shall automatically terminate
if any premium under said Policy shall not be duly
paid or if said Policy shall be surrendered or ex-
changed.

The Benefits and Provisions contained in the
Sections "Miscellaneous Benefits" and "Other
Provisions" of said Policy shall also apply to this
Agreement, except as to the provisions of said
Policy with respect to "Residence, Travel and

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

Occupation" and "Incontestability" and except as to the above conditions under which said Accidental Death Benefit shall not be payable.

In Witness Whereof the New York Life Insurance Company has caused this Agreement to be signed this 13th day of July, 1939.

ALFRED L. AIKEN

President

FREDERICK M. JOHNSON,

Secretary

D. D. LURIE

Registrar

Examined JM MB

A. D. B. 938-218. F. I.-O. L.

cp

17-395-774

17-395-775

APPLICATION TO THE NEW YORK LIFE INSURANCE COMPANY—Part I.

It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination; provided, however, that if the applicant, at the time of making this application, pays the soliciting agent in cash the full amount of the first premium for the insurance applied for in Questions 2 and 3 and so

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

declares in this application and receives from the soliciting agent a receipt therefor on the receipt form which is attached hereto, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and for the amount applied for in Questions 2 and 3, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not. 2. That the soliciting agent is not authorized to collect any premium for the insurance hereby applied for except the first premium thereon, which in no event shall exceed one annual premium for such insurance, together with the premium for preliminary term insurance, if any, and that a receipt on the form attached as a coupon to this application form is the only receipt the soliciting agent is authorized to give for any payment made hereunder before the delivery of the policy. 3. That only the President, a Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice to or knowledge of the Company, and

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)
that neither one of them is authorized to accept
risks or to pass upon insurability.

Dated at McMinnville, Ore., this 8 day of July,
1939.

Witnessed by

A. E. YOUNTS,

Soliciting Agent.

Signature of the person applying for insurance:

WARREN L. MILLER.

17-395-774

17-395-775

Application to the New York Life Insurance
Company—PART II

Answers to the Medical Examiner

This examination must be made in private; no
agent or third person being present.

Notice to Medical Examiner: Use only black ink.
This examination is to be photographed.

Do Not Use Dashes or Ditto Marks in Answering
Questions.

1. A. What is your occupation? (Full details.)
 - A. Dairyman
 - B. How long have you been engaged in your
present occupation?
 - B. 8 yr
 - C. What was your previous occupation?
 - C. Grocer
 - D. Have you ever changed your occupation or
place of residence on account of your health?
(If so, give full details.)
 - D. No

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

2. Do you intend to change your occupation or make a journey outside of Continental United States or Canada? (If so, give full details.)
No.
3. A. How many aerial flights have you taken and when last?
 - A. None
 - B. How many aerial flights have you taken within the last year?
 - B. 0
 - C. State whether as passenger or pilot and whether you are a Reservist.
 - C. None
 - D. Do you contemplate participation in aeronautics? (If so, in what capacity.)
 - D. No
4. In what States have you lived the last ten years, and which years in each?
(If outside the U. S., in what countries, and which years in each.)
Ore 10
5. A. How frequently, if at all, and in what quantity do you drink beer, wine, spirits or other intoxicants?
 - A. Yes—3 glass beer per wk.
 - B. How frequently, if at all, and in what quantity have you drunk any of them in the past?
 - B. Same

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

- C. Have you within the last five years drunk any of them to excess?
- C. No
- D. Do you now take or have you ever taken morphine, cocaine, or any other habit forming drugs?
- D. No.
6. A. Have you now pending any other application for insurance on your life or for the reinstatement of insurance?
- “Yes” or “No”—No
- B. Have you ever been examined either on or in anticipation of an application for insurance without receiving such insurance?
- “Yes” or “No”—No
- C. Have you ever been declined for life insurance or for the reinstatement of life insurance?
- “Yes” or “No”—No
- D. Have you ever been offered a policy differing in plan or amount or in premium rate from that applied for?
- “Yes” or “No”—No
7. A. Have you ever had any accident or injury or undergone any surgical operation?
- “Yes” or “No”—Yes
- If the answer to any query is “Yes” give Date, Details and Results and, if within five years, name and address of every Physician or Practitioner consulted.
- Appendectomy 1924—Perfect recovery

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

- B. Have you ever been under observation or treatment in any hospital, asylum or sanitarium?
- “Yes” or “No”—No
- C. Has albumin or sugar ever been found in your urine?
- “Yes” or “No”—No
- D. Have you ever been found to have a high blood pressure?

“Yes” or “No”—No

- E. Have you ever raised or spat blood?

“Yes” or “No”—No

- F. Have you gained or lost in weight in the last year?

“Yes” or “No”—Yes

Gain? No. Loss? #10. Cause? hard work

8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of

- A. The Brain or Nervous System?

“Yes” or “No”—No

- B. The Heart, Blood Vessels or Lungs?

“Yes” or “No”—No

- C. The Stomach or Intestines, Liver, Kidneys or Bladder?

“Yes” or “No”—No

- D. The Skin, Middle Ear or Eyes?

“Yes” or “No”—No

9. Have you ever had Rheumatism, Gout or Syphilis?

“Yes” or “No”—No

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers?
“Yes” or “No”—No.
11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years?

Name and Address (If none, say none)—Dr. Manning.

Date—1939.

Reason for Consultation, Examination or Treatment and Results—Health Card.

12. Family Record—Age if Living—Condition of Health, if not good, give full details.
Father, 61, good.
Mother, 60, good.
Brothers—1—37, good.
Sisters—1—40, good.
13. A. Is any person in your immediate household now ill with consumption? (If so, state who and what precautions are being taken.)—No.
B. Has any person in your immediate household suffered from or died of that disease within the past year?—No.

On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 1—(Continued)

them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them.

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.

Dated this 7 day of July 1939

Witnessed by

CHAS. L. WILLIAMS, M. D.,
Medical Examiner.

933-10. Oct., 1936

Signature of the person applying for insurance
WARREN L. MILLER

[Printer's Note: Other portions of Plaintiff's Exhibit 1 are set out in the Answer to Amended Complaint.]

[Endorsed]: Filed Jan. 21, 1942.

PLAINTIFFS' EXHIBIT No. 2
(Copy)

NEW YORK LIFE INSURANCE
COMPANY

A Mutual Company founded in 1845 agrees to pay to Reta D., wife of the insured, or in event of

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

her death, to Warren D. and Marcia M. Miller, children of the insured, or to such of them as shall be surviving as the benefits hereunder severally become due and payable, share and share alike * * * Beneficiary (with right on the part of the insured to change the Beneficiary in the manner provided herein) Two Thousand Dollars (the face of this policy) As Hereinafter Provided upon receipt of due proof, on forms prescribed by the Company, of the death of Warren L. Miller, the Insured, and, if such death occurs on or before the Seventeenth day of July, 1959,

The Company further agrees to pay to said Beneficiary a monthly income of Twenty Dollars beginning as of the date of death of the Insured and terminating on the last Monthly Income date prior to the Eighteenth day of July, 1959.

If due proof of the death of the Insured is received on or before the Seventeenth day of July, 1959, the face amount of this Policy will be payable upon said date. If such proof is received after said date the face amount will be payable upon receipt thereof.

And the Company agrees to pay to Said Beneficiary an additional amount of Two Thousand Dollars, upon receipt of due proof that the death of the Insured resulted, before the anniversary of this Policy on which the Insured's age at nearest birthday is 65, from accidental means as defined in and sub-

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)
ject to the provisions set forth under "Accidental
Death Benefit."

And the Company agrees to waive payment of premiums, upon receipt of due proof that the Insured is totally and presumably permanently disabled before the anniversary of this Policy on which the Insured's age at nearest birthday is 60, as provided under "Waiver of Premiums in event of Total and Permanent Disability."

Family Income—20 Year Period. Face Amount Payable at Death if Death occurs after the 20th Anniversary of this Policy; if Death occurs prior thereto, Monthly Income from Death to the 20th Anniversary of this Policy, when Face Amount is Payable. Premiums Payable during Lifetime unless Dividends Applied to Shorten Premium Paying Period. Premiums reduced at the 20th Anniversary. Waiver of Premium Disability Benefit. Accidental Death Benefit. Annual Participation in Surplus.

939-58

Fam. Inc. (20)

O. L.

D.-A. D. B.

Age 33.

Examined J. M.

MB cp

This contract is made in consideration of the application therefor and of the payment in advance

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

of the sum of \$20.10, (including \$1.44 for the Disability Benefit), the receipt of which is hereby acknowledged, constituting the first premium and maintaining this Policy for the period terminating on the Seventeenth day of October Nineteen Hundred and thirty-nine, and of a like sum on said date and every Three calendar months thereafter during the lifetime of the Insured until premiums for Twenty full years shall have been paid, and of the payment of a reduced premium of \$16.64 (including \$1.28 for the Disability Benefit) every Three calendar months thereafter during the lifetime of the Insured, subject to any reduction of the premium as provided under "Waiver of Premiums in event of Total and Permanent Disability."

(The above premiums include \$1.32 for the Accidental Death Benefit.)

This Policy shall take effect as of the Seventeenth day of July, Nineteen Hundred and thirty-nine, which day is the anniversary of this Policy.

In Witness Whereof the New York Life Insurance Company has caused this contract to be signed this Twenty-ninth day of February Nineteen Hundred and forty.

ALFRED L. AIKEN

President

FREDERICK M. JOHNSON

Secretary

D. D. LURIE

Registrar

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

17-395-774

17-395-775

APPLICATION TO THE NEW YORK LIFE
INSURANCE COMPANY—Part I.

It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination; provided, however, that if the applicant, at the time of making this application, pays the soliciting agent in cash the full amount of the first premium for the insurance applied for in Questions 2 and 3 and so declares in this application and receives from the soliciting agent a receipt therefor on the receipt form which is attached hereto, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable and entitled under the Company's rules and standards to the insurance, on the plan and for the amount applied for in Questions 2 and 3, at the Company's published premium rate corresponding to the applicant's age, then said insurance shall take effect and be in force under and subject to the provisions of the policy applied for from and after the time this application is made, whether the policy be delivered to and received by the applicant or not. 2. That the soliciting agent is not authorized to collect any

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)
premium for the insurance hereby applied for except the first premium thereon, which in no event shall exceed one annual premium for such insurance, together with the premium for preliminary term insurance, if any, and that a receipt on the form attached as a coupon to this application form is the only receipt the soliciting agent is authorized to give for any payment made hereunder before the delivery of the policy. 3. That only the President, a Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice to or knowledge of the Company, and that neither one of them is authorized to accept risks or to pass upon insurability.

Dated at McMinnville, Ore., this 8 day of July, 1939.

Witnessed by

A. E. YOUNTS,
Soliciting Agent.

Signature of the person applying for insurance:
WARREN L. MILLER.

17-395-774

17-395-775

Application to the New York Life Insurance
Company—PART II

Answers to the Medical Examiner

This examination must be made in private; no agent or third person being present.

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

Notice to Medical Examiner: Use only black ink.
This examination is to be photographed.

Do Not Use Dashes or Ditto Marks in Answering Questions.

1. A. What is your occupation? (Full details.)
 - A. Dairyman
 - B. How long have you been engaged in your present occupation?
 - B. 8 yr
 - C. What was your previous occupation?
 - C. Grocer
 - D. Have you ever changed your occupation or place of residence on account of your health? (If so, give full details.)
 - D. No
2. Do you intend to change your occupation or make a journey outside of Continental United States or Canada? (If so, give full details.) No
3. A. How many aerial flights have you taken and when last?
 - A. None
 - B. How many aerial flights have you taken within the last year?
 - B. 0
 - C. State whether as passenger or pilot and whether you are a Reservist
 - C. None
 - D. Do you contemplate participation in aeronautics? (If so, in what capacity.)
 - D. No

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

4. In what States have you lived the last ten years, and which years in each?
(If outside the U. S., in what countries, and which years in each.)
Ore 10
5. A. How frequently, if at all, and in what quantity do you drink beer, wine, spirits or other intoxicants?
 - A. Yes—3 glass beer per wk
 - B. How frequently, if at all, and in what quantity have you drunk any of them in the past?
 - B. Same
 - C. Have you within the last five years drunk any of them to excess?
 - C. No
 - D. Do you now take or have you ever taken morphine, cocaine, or any other habit forming drugs?
 - D. No.
6. A. Have you now pending any other application for insurance on your life or for the reinstatement of insurance?
“Yes” or “No”—No
- B. Have you ever been examined either on or in anticipation of an application for insurance without receiving such insurance?
“Yes” or “No”—No
- C. Have you ever been declined for life insurance or for the reinstatement of life insurance?
“Yes” or “No”—No

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

D. Have you ever been offered a policy differing in plan or amount or in premium rate from that applied for?

“Yes” or “No”—No

7. A. Have you ever had any accident or injury or undergone any surgical operation?

“Yes” or “No”—Yes

If the answer to any query is “Yes” give Date, Details and Results and, if within five years, name and address of every Physician or Practitioner consulted.

Appendectomy 1924—Perfect recovery

B. Have you ever been under observation or treatment in any hospital, asylum or sanitarium?

“Yes” or “No”—No

C. Has albumin or sugar ever been found in your urine?

“Yes” or “No”—No

D. Have you ever been found to have a high blood pressure?

“Yes” or “No”—No

E. Have you ever raised or spat blood?

“Yes” or “No”—No

F. Have you gained or lost in weight in the last year?

“Yes” or “No”—Yes

Gain? No. Loss? #10. Cause? hard work

8. Have you ever consulted a physician or practitioner for or suffered from any ailment or disease of

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

A. The Brain or Nervous System?

“Yes” or “No”—No

B. The Heart, Blood Vessels or Lungs?

“Yes” or “No”—No

C. The Stomach or Intestines, Liver, Kidneys or Bladder?

“Yes” or “No”—No

D. The Skin, Middle Ear or Eyes?

“Yes” or “No”—No

9. Have you ever had Rheumatism, Gout or Syphilis?

“Yes” or “No”—No

10. Have you ever consulted a physician or practitioner for any ailment or disease not included in your above answers?

“Yes” or “No”—No.

11. What physicians or practitioners, if any, not named above, have you consulted or been examined or treated by within the past five years?

Name and Address (If none, say none)—Dr. Manning.

Date—1939.

Reason for Consultation, Examination or Treatment and Results—Health Card.

12. Family Record—Age if Living—Condition of Health, if not good, give full details.

Father, 61, good.

Mother, 60, good.

Brothers—1—37, good.

Sisters—1—40, good.

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

13. A. Is any person in your immediate household now ill with consumption? (If so, state who and what precautions are being taken.)—No.
- B. Has any person in your immediate household suffered from or died of that disease within the past year?—No.

On behalf of myself and of every person who shall have or claim any interest in any insurance made hereunder, I declare that I have carefully read each and all of the above answers, that they are each written as made by me, and that each of them is full, complete and true, and agree that the Company believing them to be true shall rely and act upon them.

I expressly waive, on behalf of myself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has heretofore attended or examined me, or who may hereafter attend or examine me, from disclosing any knowledge or information which he thereby acquired.

Dated this 7 day of July 1939

Witnessed by

CHAS. L. WILLIAMS, M. D..
Medical Examiner.

933-10. Oct., 1936

(Testimony of R. A. Durham.)

Plaintiffs' Exhibit No. 2—(Continued)

Signature of the person applying for insurance

WARREN L. MILLER

[Printer's Note: Other portions of Plaintiff's Exhibit 2 are set out in the Answer to Amended Complaint.]

[Endorsed]: Filed Jan. 21, 1942.

Mr. Neuner: Q. I hand you herewith Plaintiffs' Pre-Trial Exhibit No. 3 and ask you to state whether or not that is your signature, or a letter that emanated from your office?

A. This is the letter with which that—I didn't personally sign this letter but it was signed by one of the clerks in my office.

Q. Under your supervision?

A. Well, it is in the regular course of her work. It is a lady who signed this.

Q. Well, that is your name?

A. My name is signed on the typewriter, "R. A. Durham, Cashier, By" and then this other person personally signed the letter.

Mr. Neuner: All right. We will offer that letter in evidence.

The Court: It is admitted and may be marked.

(The letter dated November 26, 1940, R. A. Durham, Cashier, to Warren L. Miller, so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 3, was further marked "and trial".) [27]

(Testimony of R. A. Durham.)

PLAINTIFFS' EXHIBIT No. 3

New York Life Insurance Company

Oregon Branch Office
Public Service Building, 920 S. W. Sixth Ave.,
Portland, Ore.

B. M. Downie, Agency Director
Bernard A. Young, Agency Organizer
R. A. Durham, Cashier

Telephone ATwater $\left\{ \begin{array}{l} 3353 \\ 3354 \\ 3355 \\ 3356 \end{array} \right.$

File NC

Nov. 26, 1940.

Mr. Warren L. Miller,
Gen. Del.,
McMinnville, Oregon

Re—Pols. # 17 395 774-5

Dear Sir:

It is necessary to inform you that the check tendered in payment of the premiums of \$28.62 and \$20.10 due Oct. 17, 1940 for the above numbered policies on your life, and of which the following is a copy:

(Testimony of R. A. Durham.)

96-67 The First National Bank 96-67
Of McMinnville

McMinnville, Ore. Nov. 17, 1940. No.....

Pay to the Order of New York Life Ins. Co., \$48.72.

Forty-eight and 72/100..... Dollars

L. A. MILLER & SON

By Warren L. Miller

was not honored when presented to the bank for payment, and has been returned to us. Because of this fact, the premium now stands unpaid.

Inasmuch as the grace period allowed for payment of the premium has expired, this policy has, by its terms become lapsed on the books of the Company.

We regret the necessity of returning the above described check, which is enclosed, and request that you return the Official Receipts given at the time the Company first received the check, using the enclosed stamped addressed envelope.

The Company urges you to immediately apply for the reinstatement of your policy, by filling in complete and accurate answers on the attached form of Personal Health Certificate. Be sure to sign and date the form, and also have it signed by a witness.

Please then return the form, accompanied by a remittance of \$49.07 (which includes interest to Nov. 29, on the past-due premiums) to this office, in order that if the evidence of insurability is found to be satisfactory to the Company, your policy may be promptly reinstated.

(Testimony of R. A. Durham.)

Very truly yours,
R. A. DURHAM,
Cashier
By N. CALHOUN,

NC:L

To Avoid Delays, Please Always Give Policy Number When Writing the Company.

[Endorsed]: Filed Jan. 21, 1942.

Mr. Neuner: I think counsel will waive the reading now at this time?

Mr. Davis: Yes. I want to see what your letter is.

Mr. Neuner: Well, that is November 26th.

Q. We will hand you Pre-Trial Exhibit No. 4, being a check, and ask you to state whether that is the check referred to in your letter, Plaintiffs' Pre-Trial Exhibit 3.

A. Yes, this is the check.

Mr. Neuner: We offer that in evidence, your Honor.

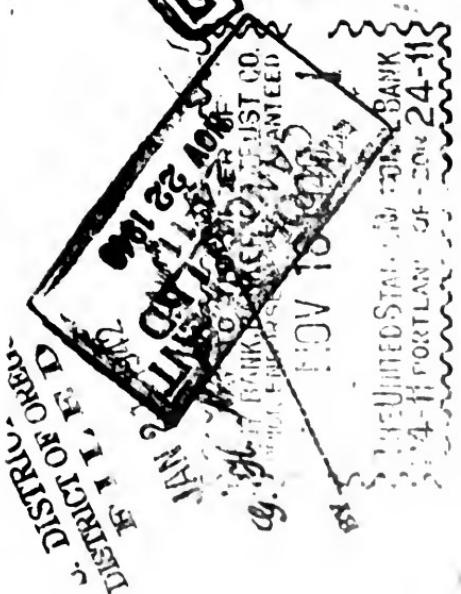
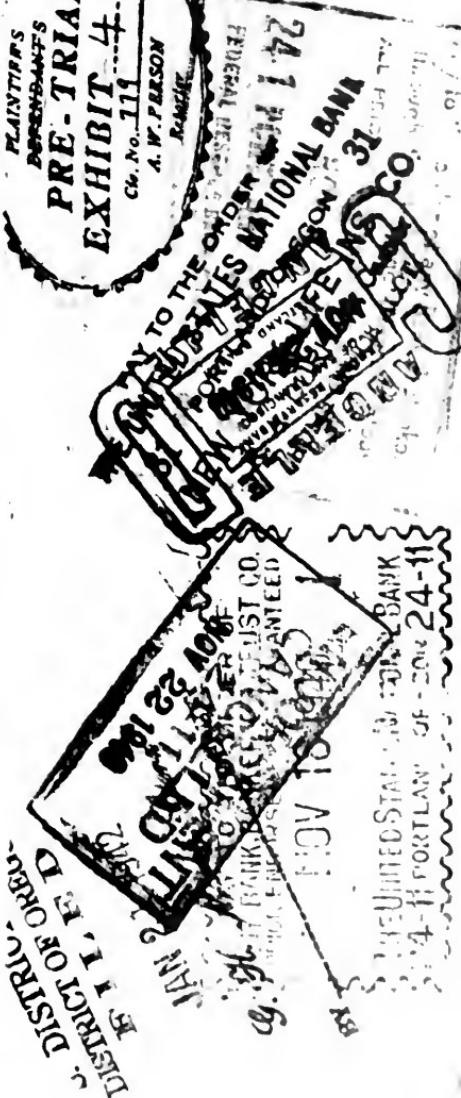
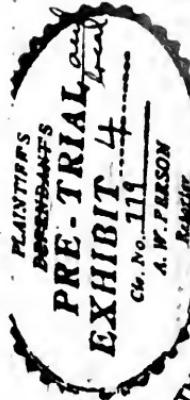
The Court: It is admitted.

(The canceled check dated November 17, 1940, on The First National Bank of McMinnville, payable to the order of New York Life Ins. Co. in the amount of \$48.72 and signed L. A. Miller & Son by Warren L. Miller, so offered and received, having been previously marked Plaintiffs' Pre-trial Exhibit 4, was further marked "and trial".)

99²⁷ THE FIRST NATIONAL BANK 96⁶⁷ 1
OF MCINNIVILLE

105 M^c MINNVILLE, ORE. Yous 17 1940 NO. 4972
PAY TO THE ORDER OF New York Life Ins Co \$ 4972
One hundred and 75 DOLLARS

17 395 774-5
Lor Miller Rose
By Karen Lomilk



(Testimony of R. A. Durham.)

Mr. Neuner: And I might also offer the registered envelope, which is Plaintiffs' Pre-trial Exhibit 3-A, as part of the same transaction.

The Court: It is admitted.

(The registered envelope of Oregon Branch Office New York Life Insurance Company addressed to Mr. Warren L. Miller, so offered and received, having [28] been previously marked Plaintiffs' Pre-trial Exhibit 3-A, was further marked "and trial".)



(Testimony of R. A. Durham.)

Mr. Neuner: Q. I likewise hand you Plaintiffs' Pre-trial Exhibit 8-a and ask you if that letter was prepared and mailed under your direction?

A. Yes.

The Court: Show it to Mr. Huntington, Mr. Bragg.

Mr. Davis: (After examining said letter) I understand you have offered this?

Mr. Neuner: Yes.

Mr. Davis: If the Court please, we object to the introduction of Plaintiffs' Pre-Trial Exhibit 8-a on the ground that this is something that occurred subsequent to the transaction, and which the plaintiffs claim constituted payment of the premiums on these policies. It has no bearing on the issues of the case.

The Court: Bring it to me, Mr. Bragg, please.
(The Court peruses said letter.) It may go in.

(The letter dated December 2, 1940, R. A. Durham, Cashier, to Warren L. Miller, so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 8-a, was further marked "and trial".)

(Testimony of R. A. Durham.)

PLAINTIFF'S EXHIBIT No. 8-A

New York Life Insurance Company

Oregon Branch Office

Public Service Building, 920 S. W. Sixth Ave.,

Portland, Ore.

B. M. Downie, Agency Director

Bernard A. Young, Agency Organizer

R. A. Durham, Cashier

Telephone ATwater 3353

3354

3355

3356

File G

December 2, 1940

Mr. Warren L. Miller

General Delivery

McMinnville, Oregon

Re: Pol. # 17 395 774/5

Dear Mr. Miller:

We thank you for your letter of Nov. 28th to which was attached the money order of \$49.07, which we regret we must return herewith because you did not furnish us with the application for reinstatement as requested in our letter of November 26th when we returned the not-honored check.

In case the other has been misplaced, we are attaching another for you to complete and return with the money order of \$49.07. Be sure to answer all three questions, date the form and have your signature witnessed.

(Testimony of R. A. Durham.)

Upon receipt of same, the matter of reinstatement will be given prompt consideration.

Very truly yours,

R. A. DURHAM,

Cashier

By K. H. G.

KHG:vc

Inc.

To Avoid Delays, Please Always Give Policy Number When Writing the Company.

[Endorsed]: Filed Jan. 21, 1942.

Mr. Neuner: Q. I now hand you Plaintiff's' Pre-Trial Exhibit 8-c, being the money order referred to in your letter, [29] Pre-Trial Exhibit No. 8-a.

A. This may be the money order but I could not identify that because we have no endorsement on it. It is the same amount that is mentioned in that letter but I couldn't identify the money order.

Q. Did you receive a money order?

A. We did, yes. This is probably the one.

Mr. Neuner: All right. We offer it in evidence.

Mr. Davis: If the Court please, we don't object to it on the ground it is not the particular money order referred to, but we do object to it on the same grounds as the other objection stated to Plaintiff's' Pre-Trial Exhibit 8-a.

(Testimony of R. A. Durham.)

The Court: It will be admitted.

(The United States Postal Money Order dated November 28, 1940 payable to New York Life Ins. Company in the amount of \$49.07, remitter Mrs. Warren L. Miller, so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 8-c, was further marked "and trial".)

(Testimony of R. A. Durham.)

Mr. Neuner: Q. Mr. Durham, when did you receive that check from the bank in return after you had deposited it?

A. According to our records it must have been on the 25th of November.

Q. What does the stamp on the reverse side allude to, "Endorsement canceled November 22, 1940"? [30]

A. I couldn't tell you. That is something put on there outside of our office.

Q. Is that your cancellation? A. No, sir.

Q. You endorsed this check, didn't you?

A. We have a rubber stamp endorsement on there.

Q. And you had authority to endorse "New York Life Ins. Co."? A. Yes, for deposit.

Q. For deposit. What do you mean by "for deposit"?

A. Well, I don't know whether you can read that endorsement or not. It tells it is to be credited to a certain account.

Q. Well, that is to the account of New York Life Insurance Company? A. Yes.

Q. And you say that you didn't—that this endorsement was not canceled in your office?

A. I think that was done at the bank.

Q. Now that endorsement was canceled on the 22nd; then where was this check from the 22nd to the 25th, when you got hold of it?

A. Well, I couldn't tell you.

(Testimony of R. A. Durham.)

The Court: What day was Thanksgiving, what day of the month?

Mr. Davis: The 21st.

The Court: The 25th was Monday?

Mr. Neuner: Now if this check had cleared——

[31]

The Court: Let's straighten our dates out. Thanksgiving was the 21st?

Mr. Neuner: I haven't looked it up, your Honor. I am willing to take counsel's word for it. They say they looked it up.

Mr. Davis: Thursday was the 21st.

The Court: What happened, as shown on the back of the check, on the 22nd, Mr. Neuner?

Mr. Neuner: The check shows on its face that the endorsement was canceled on November 22nd.

The Court: That would be Friday of the week?

Mr. George Wm. Neuner: That would be Friday.

The Court: Now you just asked Mr. Durham a question about the 25th. If he got the check on the 25th, was that the following Monday?

Mr. George Wm. Neuner: That was the following Monday, the 25th.

Mr. Neuner: Yes. The 22nd was Friday, 23rd, 24th; the 25th would be the following Monday.

The Court: So the jury may be able to follow this, the point of Mr. Neuner's question is that this check, after it was turned down out at McMinnville, came back to the bank in Portland, where Mr. Durham had deposited it, and the cancellation of en-

(Testimony of R. A. Durham.)

dorsement was made in the bank here in Portland
on—

Mr. Neuner: The 22nd.

The Court: —on Friday, the 22nd, the day after Thanksgiving, [32] and it didn't get to Mr. Durham's office until the following Monday; and, knowing banks as I do, I imagine it didn't get far away from the bank either.

Mr. Neuner: Q. Did you go after this check, or was it sent to the office?

A. They brought it up to the office.

Q. Who brought it up?

A. Some bank messenger.

Q. You send the checks down and the bank sends them back; is that the idea?

A. If the check is returned NSF, or for any reason, they usually send a messenger up to the office and we give them our check for it.

Q. And you gave your check on the 25th, you say?

A. Yes; I believe that is the date of the check. That is as I remember it.

Q. Yes. Now if this check had cleared and had been returned to your office on the 25th for the amount therein stated, then the Company would have accepted that in payment of the premiums, would it not?

A. I don't know whether I understand your question.

Q. The check would not have been returned, you would have gotten the money in lieu of it.

(Testimony of R. A. Durham.)

A. Well, when the check is not returned the transaction would have been closed. [33]

Q. Yes. As far as your company is concerned, if this had been paid any time after the 22nd, or otherwise, why, the transaction would have been closed?

Mr. Davis: If the Court please, we object to that question as argumentative. Also it calls for a conclusion of the witness.

Mr. Neuner: I don't think it calls for a conclusion of the witness, your Honor. The point I am trying to make is this: That they maintain here that they acted within the grace period, and it shows on the face of it that they didn't return it until three days after the grace period, then there was another three days before they got the check, and that is the reason I put that question. I claim nothing for it, as far as that goes, outside of that.

The Court: I sustain the objection.

Mr. Neuner: Q. Do you recall when this check came to your office? I believe it is agreed on the 13th; is that correct?

A. That is what our receipt shows, that we got it on the 13th.

Q. That is your record? A. Yes.

Q. You got the check on the 13th of November?

A. Yes.

Mr. Neuner: That is all.

Mr. Davis: There will be no cross examination.

(Witness excused.) [34]

Mr. Neuner: Call Mr. Yount.

A. E. YOUNT

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: May I have your correct name for the reporter?

The Witness: A. E. Yount.

By Mr. Neuner:

Q. Where do you reside, Mr. Yount?

A. I reside in Portland.

Q. How long have you resided here?

A. Twenty-one years.

Q. Just talk to the jury, please.

A. Yes, sir.

Q. And what is your business or occupation?

A. I am soliciting agent for the New York Life.

Q. And how long have you been employed in that capacity?

A. It will be sixteen years the first of March.

Q. And what territory do you cover?

A. Well, our license is allowed for any place in the State of Oregon.

Q. You speak of license; that is your license from the State of Oregon?

A. From the State of Oregon.

Q. Do you obtain that license, or is the company licensed? [35]

A. The company obtains the Oregon license.

Q. Now were you acquainted with Warren L.

(Testimony of A. E. Yount.)

Miller during his lifetime? A. Yes, sir.

Q. How long did you know him?

A. Somewhere between eighteen and twenty years.

Q. And were you both reared in the Yamhill country? A. No.

Q. You got acquainted there?

A. Got acquainted out there. I knew him when he was in grade school. I was a Y. M. C. A. secretary and he was in camp with me when he was in Bridgeport.

Q. I see. And was that relationship between you and Warren during that time of a close, intimate nature?

A. Friendly, yes; very good friendly relationship.

Q. Did you solicit Mr. Miller for these policies here? A. Yes, sir.

Q. And you were the soliciting agent that took those policies? A. Yes, sir.

Q. Collected the premiums?

A. Well, I was responsible for the first premium on the policy. The policy is billed to me and I am responsible for the first one but not for any after that.

Q. I see. Now during that time—this was July, I believe, 1939, when these policies were issued? [36]

A. Yes.

Q. How many times had you seen Warren L. Miller since that time? A. On July, 1939?

(Testimony of A. E. Yount.)

Q. Since that time, yes.

A. Well, I picked up a reinstatement of those policies in August at the Fair in Clackamas County. I may be wrong. I think it is the Clackamas County Fair at Canby. And I made arrangements for the deliverance or getting a policy for his son for the 13th day of November. Then I saw him probably—

The Court: You are talking about 1940 now? 1940?

A. Yes. I beg your pardon. Mr. Neuner, was that since '39?

Mr. Neuner: Since '39.

The Witness: Oh, I beg your pardon. I didn't get your question.

The Court: These policies were originally issued in July, '39?

A. Yes, sir; and I delivered the policies in July and I saw him, I should guess—I guess probably every six weeks or two months from that time on.

Mr. Neuner: Q. You spoke now of getting some reinstatement. Was that on these policies?

A. Yes, sir. That is the one in 1940. That was a reinstatement that I spoke of. I understood your question was from July, in '40, in place of '39.

Mr. Neuner: No. I asked '39. [37]

The Witness: I see.

Q. You had sold him some policies before that in the New York Life, hadn't you?

A. Yes, sir, I had.

(Testimony of A. E. Yount.)

Q. How many?

A. Three. I beg your pardon. I guess, two, perhaps. I think I had better correct that, because the amounts were the same, but these last two policies, the amount was the same but divided in two policies, and then there were—I would have to consult the record to be sure, but the policy issued in about '37, that was carried, I think kept in force perhaps six months. Now I am not certain that was issued in two policies or one, but the amount was the same. And then I had sold him a policy in perhaps '26 or '27 that had been kept in force some six or seven years.

The Court: This is all New York Life?

A. All New York Life, yes, sir.

The Court: Did he have insurance in any other company other than the New York Life?

A. He did. When I sold him the first policy he had a policy in another company.

Mr. Neuner: Q. He gave that up?

A. I never knew when he did. I was under the impression that that was in force.

Mr. Davis: If the Court please, it seems to me we are going [38] into a lot of entirely immaterial matter, not within the pleadings, not within the admitted facts, so far as we can see serves no purpose.

The Court: Well, I take it it is my fault for asking the question. Go ahead, Mr. Neuner. I am the one that raised it.

(Testimony of A. E. Yount.)

Mr. Neuner: Q. Now I am still in doubt about one or two of those statements you made there about having seen him at the Clackamas County Fair and several times since that time. I am concerned about these policies, these two that are involved here. The fact of the matter is, he took your advice on insurance, didn't he?

A. Yes, sir, with one exception.

Q. Yes. Well, he took these policies on your solicitation? A. Yes, sir.

Q. And he paid you some of the premiums?

A. Premiums were paid—

Mr. Davis: Now if the Court please, I object to that question, using the term that he paid him some of the premiums. The policies provide how the premiums are to be paid, and there are no premiums in question other than the premiums here on October 17, 1940.

Mr. Neuner: Here, your Honor, is an agent that has been with the company a long time. Here he has a confidant on whose insurance he advises him and to whom the insured paid his policies. Our contention is we have a right to show that, to show the rela- [39] tionship, because the company has received the proceeds from these policies.

Mr. George Wm. Neuner: Premiums.

Mr. Neuner: The proceeds in payment of these premiums, and we maintain it is very material, and we believe we are within our rights to show that relationship.

(Testimony of A. E. Yount.)

The Court: I think it would be better if you would move now to the events on November 13th and then work back from there to the relations of the parties.

Mr. Neuner: All right.

Q. Now did you see Warren L. Miller on November 13th, 1940? A. Yes, sir.

Q. Where?

A. Well, perhaps—I don't know the distance there but it was on a farm adjoining his home ranch where he was.

Q. And about what time was it?

A. Between one thirty and two o'clock, I would judge.

Q. Will you please tell the jury why you went out there. A. Well, I had this—

Mr. Davis: Now, if the Court please, we object to that as incompetent, irrelevant and immaterial, not binding upon the defendant.

The Court: He may answer.

A. I delivered a policy for his son. That was the birthday of the son, and I took the policy there at that particular time. [40]

The Court: Did you go to the house first?

A. I went to the house first, yes, sir.

The Court: To find out where he was?

A. To find out where he was. I was a little bit late getting in there. I nearly always called at noon, because he was at home at noon.

The Court: Did you find out from Mrs. Miller?

A. Yes, sir.

(Testimony of A. E. Yount.)

Mr. Neuner: Q. Who did you deliver this policy to? A. To Warren L. himself.

Q. All right. Now tell the jury whether or not there was any conversation between you and Mr. Miller relative to the premium due on his policy on October 17th, 1940. A. Yes, there was—

Mr. Davis: Now just a minute. If the Court please, I think he could answer that question either "yes" or "no", which he did answer "Yes".

The Court: Did you answer "yes"?

A. Yes, sir.

Mr. Davis: Now we are going to object to the introduction of the conversation, if it is with respect to the premiums on these policies in question, because the agent has no authority under these policies in respect to these premiums in question, and any conversations or any statements he made at that time are not binding upon the defendant. [41]

Mr. Neuner: I will withdraw that and ask this question.

Mr. Davis: Furthermore, if the Court please, we think the pre-trial order covers all of these questions we are going into at the present time.

The Court: The question has been withdrawn.

Mr. Neuner: Q. Was there anything said at that time regarding the premiums on his policies?

A. Yes, sir.

Mr. Davis: If the Court please, we object to that question on the same reason. The Court is going to have to rule on it.

(Testimony of A. E. Yount.)

The Court: Yes, I will rule. Don't worry about that. He just answered the preliminary "yes". Now ask the next question.

Mr. Neuner: Q. What was said?

The Court: Now wait a minute.

Mr. Davis: Now if the Court please, defendant objects to this question on the ground that the agent has no authority to bind the company in respect to these premiums in question. He had no authority to collect them. Any conversations which he had at that time with the assured are not binding upon the defendant.

The Court: The objection is overruled. He may answer. Go on and tell what happened between you and Miller. Now what was said and what was done? This is all subject to the objection of the defendant.

A. The policy for the boy was—— [42]

The Court: Where did you find him? Out in the field? A. Yes, sir.

The Court: What was he doing?

A. He was running a tractor and plowing.

The Court: Was he alone? A. Yes, sir.

The Court: Just you and he had this talk?

A. Yes, sir.

The Court: Go ahead and tell what was said between you and what was done, all subject to the defendant's objection.

A. Well, it had nothing to do with the boy's policy anyhow.

The Court: What?

(Testimony of A. E. Yount.)

A. I couldn't say anything about the boy's policy.

The Court: No. That is just incidental.

A. Yes, sir.

The Court: That is the reason you went to see him, I understand?

A. Yes, sir. That is right.

The Court: To deliver that new policy on the boy's life?

A. That is right. And in the course of delivering this new policy he asked me about the settlement of it and if he might arrange for thirty days' time in which to clear it.

The Court: That is on the new policy?

A. That is on the new policy, yes, sir.

The Court: That would be the first premium on it? [43]

A. That would be the first premium on it. I am responsible for that premium.

The Court: That is not the policy, gentlemen, in this case.

The Witness: That is right.

The Court: There are two other policies in this case. This explains how this gentleman happened to go to see him that day.

The Witness: Then when we fixed up and arranged for the policy for the boy, his son, then I said to him, "Now don't forget that your own policies—you must mail us your check by the 17th." "Well," he said, "I will give you a check for it now if you know how much it is."

(Testimony of A. E. Yount.)

The Court: You were talking to him on Wednesday, the 13th?

A. I was talking to him on the 13th. I am not sure of the day, your Honor, without looking it up on the calendar, but it was on the 13th day of November, because that is the boy's birthday. So he said, "I will give you a check for it now if you know the amount." So I told him the amount, and so he started to write the check and I said, "Make the check to the company." He made the check to the company and when he gave it to me I noticed that the amount was correct and was made to the company, and otherwise than that I paid no attention to him—I paid no attention to it. I don't recall that I gave a receipt for it at the time.

The Court: He had a check book with him, I suppose?

A. Yes, sir, he did. He had a check book with him. [44]

The Court: In his pocket? A. Yes, sir.

The Court: He got down off of the tractor?

A. He came down really into the yard in front of the house where I drove in. He expected me that day and was watching for me.

The Court: Oh, he came into the yard then?

A. Yes. He left his tractor. He left his tractor out where he was plowing and came up into the yard.

The Court: He saw you out there?

(Testimony of A. E. Yount.)

A. Yes, sir. I drove in there and he saw me. He was watching for me. He expected to see me. As I recall, his wife told me—

The Court: No. You don't need to give that.

The Witness: That is right. So I came to Portland and turned the check over to the cashier's office.

The Court: You had told him that it must be paid by the 17th? A. Yes, sir.

The Court: I understood you to say?

A. Yes, sir; that is right.

The Court: That was the last day of grace?

A. That was the last day of grace.

The Court: No doubt you picked up that information? Anyhow, you thought he should have that in mind?

A. Yes, that is right. We had talked about it when I got the application for the boy's insurance.

The Court: Go ahead now. [45]

A. That pretty well closed the incident. He got on the tractor and went to work, I came back to Portland and I turned the checks over to the cashier's office and asked that receipts be mailed.

The Court: That afternoon?

A. That afternoon, yes, sir.

The Court: At what time, do you know? Was it after banking hours?

A. Yes, sir. I imagine it would be after banking hours, because I drove in from there, and I left him probably some time about two o'clock.

(Testimony of A. E. Yount.)

The Court: That was the 13th?

A. The 13th, yes, sir. I drove to Portland, parked the car and went to the office, so I judge the cashier's office didn't get the check before four o'clock.

The Court: You said a minute ago you were not sure you gave him any kind of receipt.

A. I am not certain that I gave him any receipt at all for the check. I am not certain I did.

The Court: You say now you didn't notice what date he put on the check?

A. No, sir, I didn't notice the date on it?

The Court: It was dated, in fact, the 17th?

A. I found that out afterwards but I didn't know at the time.

The Court: Go ahead, Mr. Neuner. [46]

Mr. Neuner: Q. You knew the date, didn't you?

A. You mean I knew the date of the check?

Q. You knew the date that you were out there?

A. Oh, yes, I knew the date because of the boy's birthday and the date of his policy.

Q. You made out a note in your own handwriting and dated it, didn't you, the 13th?

A. Yes, sir, but that had nothing to do with his policies.

Q. No, but you say that you called his attention to the fact that he should not forget his own policies? A. Yes, sir.

Q. And you want to tell this jury—

The Court: That must have been—I would like to keep these days in mind; it helps me and may

(Testimony of A. E. Yount.)

help the jury. That must have been on Wednesday, gentlemen.

Mr. Neuner: On Wednesday, yes.

The Court: Because the following week, Thursday, Thanksgiving, was the 21st.

Mr. George Wm. Neuner: That is right. The 13th was a Wednesday.

The Court: So this was on Wednesday of the week, gentlemen of the jury, that this talk was had out there, Wednesday, the 13th, and the check was dated the 17th, which it turned out was the following Sunday; is that correct?

Mr. Davis: That is right. [47]

The Court: Now Mr. Neuner, pardon the interruption.

Mr. Neuner: Q. When did you next go to see him?

A. I never saw Mr. Miller after that. I saw his wife Saturday following his accident. No; Monday following his accident.

Q. That was on the 2nd of December?

A. If that would be the date that would be the one. I understand he was injured the 27th. I went to the Coast, came back Friday night and saw the announcement of his injury in the newspaper and then I went the following Monday.

Q. You say you saw the account of his injury Friday night?

A. I believe I saw it in the paper Friday night, when I came back from the Coast.

(Testimony of A. E. Yount.)

Q. That was the 29th?

A. I don't know the date.

Q. And then you went out there the following Monday? A. Yes, sir.

Q. Did you report to the office that he had been injured? A. No, sir.

Q. Now when you stated that he came over and signed the check in the yard, which yard did you mean, the yard of the house or the place where he was living or in the place where he was plowing?

A. The place where he was plowing. He didn't leave that place.

Q. That was some mile or two miles from the other place, was it not? [48] A. Yes, sir.

Q. Where did Mr. Miller get the check book that he wrote you the check from?

A. He had it in his pocket. I think, as I recall, Mrs. Miller told me that he had a check with him—a check or a check book with him.

Q. Did you tell Mrs. Miller what you wanted?

A. She knew. I don't think I said anything about it.

Q. And she volunteered that, that he had a check book with him?

A. He expected to see me that day because it was the boy's birthday. This policy was issued to the boy on his birthday and it was to be a birthday present.

Q. Did he have a pen?

(Testimony of A. E. Yount.)

A. I am not certain whether he used my pen. Probably he did.

Q. What did he use as a table to write the check on?

A. Sat down on the running board of my car and wrote on his knee.

Q. Were you out or were you in the car?

A. I was in the car.

Q. On the side that you were on?

A. Yes, he was on the side I was on.

Q. Now I am going back now to other premiums that he paid on this policy. What was his custom of paying these premiums?

Mr. Davis: If the Court please, we object to that as incompetent, irrelevant and immaterial, not within the issues of the case. [49]

The Court: For the time being the objection is sustained. I will hear you later, Mr. Neuner, about that.

Mr. Neuner: Q. You have collected premiums from him before on these policies, have you not?

Mr. Davis: If the Court please, that is objected to on the same grounds.

The Court: The same ruling.

Mr. Neuner: Q. At the time that he wrote this check in your presence, did you see him make any entries in the check book?

A. No, sir. I don't—I didn't know anything about his own personal setup at all.

(Testimony of A. E. Yount.)

Q. Well, did he just write out the check, or did he finish the stub?

A. He sat on the running board of my car and I was in the seat, and it is a coach and, as I recall, I am not certain whether the door was closed or not but anyway he was down below me as he sat on the board and I didn't—I couldn't have seen his check book without looking over his shoulder particularly to read it as he went along, and I didn't do it.

The Court: Did you leave that new policy there or at the house as you went by the house?

A. I left the new policy with him for the boy.

The Court: Do you remember what kind of a day it was?

A. Well, I don't, any more than I think it was an overcast day. It wasn't raining. [50]

Mr. Neuner: Q. You are acquainted with the L. A. Miller, the father?

A. I know him, not very well. I know Mr. Miller.

Q. Do you know the other members of the Miller family?

A. No. I have met—I met the Mrs. Miller, Warren's mother, in some years gone back, but I don't know the other members of the family.

Mr. Neuner: You may cross examine.

Cross Examination

By Mr. Davis:

Q. Mr. Yount, did you have the official premium receipts with you? A. No.

(Testimony of A. E. Yount.)

Q. At the time you called on him on November 13th?

A. No. The agent never has those receipts. These could only come from the cashier.

Mr. Davis: That is all.

Mr. Neuner: Just a minute, please. I would like to open the sealed exhibits and inspect one of them, if I may.

The Court: Well, open them by order of the Court, which is the usual practice. Let me look at them.

(The sealed exhibits were opened by the Clerk and examined by the Court.)

The Court: Show them to Mr. Davis now, Mr. Neuner, please.

Mr. Neuner: I would like to have this marked, please, Plain- [51] tiffs' Pre-Trial Exhibit No. 23, I guess.

(The note dated November 13, 1940, to A. E. Yount in amount of \$29.70, signed Warren L. Miller, so offered, was marked Plaintiff's Pre-Trial Exhibit 23.)

The Court: I am going to suggest you defer examination on that until I can hear you on it and Mr. Yount will remain in attendance.

Mr. Neuner: What is it?

The Court: Just defer that until I hear you on it. Mr. Yount will remain in attendance. I will request him to do so.

(Testimony of A. E. Yount.)

Mr. Neuner: Yes. That is all I have, your Honor.

The Court: Any further cross?

Mr. Davis: No further cross examination.

The Court: Stay in the court room, Mr. Yount, for a little while until you are excused.

(Witness withdrawn.)

RETA D. MILLER,

one of the plaintiffs, was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Neuner:

Q. Your name is Reta D. Miller?

A. Reta D. Miller, yes. [52]

Q. Speak up so the jury can hear you, please.

What relationship were you to Warren L. Miller?

A. Wife.

Q. You are one of the plaintiffs in this case?

A. Yes.

Q. And Warren D. Miller and Marcia M. Miller, minors, are they the son and daughter of yourself and Warren L. Miller, deceased?

A. Yes.

Q. All plaintiffs in this case? A. Yes.

Q. Mrs. Miller, I will ask you to tell the jury whether or not Warren L. Miller ever saw the Plaintiffs' Pre-Trial Exhibit No. 4 here.

(Testimony of Reta D. Miller.)

Mr. Davis: Just a minute.

The Court: Just a minute, Mrs. Miller. Have you finished the question?

Mr. Neuner: I have finished the question.

The Court: And what was the question, whether he ever saw it?

Mr. Neuner: Whether Warren L. Miller during his lifetime—

The Court: You mean after he gave it to Mr. Yount?

Mr. Neuner: Yes; upon its return.

The Witness: No.

Mr. Neuner: My question probably was—strike that, please.

Q. Mrs. Miller, I will ask you to examine Plaintiffs' Pre-Trial Exhibit No. 4 and state whether or not you have seen that before. [53]

A. He didn't see it.

Q. I asked you whether you saw it before.

A. I saw it when it was returned to me.

Q. Yes. Well, tell the Court and jury when it was returned.

A. I had never seen the check until it was returned to me when I opened the registered letter and saw this check.

Q. Now then, after it was returned—

The Court: That was the day after the accident, wasn't it?

A. Yes, it was the day after the accident.

The Court: He was in the hospital at that time?

(Testimony of Reta D. Miller.)

A. He was in the hospital when I opened the letter and got this check.

Mr. Neuner: Q. Did Warren L. Miller see that check after it was returned?

Mr. Davis: Now, if the Court please——

A. No.

Mr. Davis: ——I move to strike the answer.

The Court: On what ground, Mr. Davis?

Mr. Davis: On the ground that she may not have been in his presence during all of that time. It is entirely immaterial. I think she could testify as to what she did with the check, and as to whether or not she showed it to him.

The Court: All right. Go at it that way.

Mr. Neuner: That is all right.

Q. What did you do with that check when you received it on the [54] 28th of November.

A. Well, I opened it and after I saw what it was I immediately went uptown and got a money order and gave them what they asked for.

Mr. Davis: Now, if the Court please, I move to strike the answer as not being responsive to the question.

The Court: Mrs. Miller, what you mean is, you mailed the money order in to them?

A. Yes.

The Court: That is all you mean?

A. I mailed a money order in to them, and I got the money order and mailed it.

(Testimony of Reta D. Miller.)

Mr. Davis: I think the Court should understand we are objecting to all the testimony of transactions subsequent to the mailing of this check back to the assured, as not being within the issues.

The Court: You had better restate your issue on that without leaving it to me to make the record. I understand it, but—

Mr. Davis: For the record, we are objecting to the testimony in regard to the postoffice money order because it has no bearing upon the issues in this case and is subsequent to the transaction in respect to the payment and subsequent to the transaction in respect to which the plaintiffs claim constituted payment.

The Court: The answer may remain regardless of the objection. [55]

Mr. Neumer: Q. Now the exhibit which you hold in your hand, Plaintiffs' Pre-Trial Exhibit No. 4—

Mr. Davis: May I interrupt just a minute, please? If the Court please, part of her answer was that she gave them what they asked for.

The Court: Yes, and I sought to clear that up by asking her if it was not a fact that all she meant was she got a money order and sent it in for the amount of the check.

Mr. Davis: As long as that is understood, because the letter requested an application for reinstatement, which wasn't returned, and I didn't want the record to show that she was saying that it was returned.

(Testimony of Reta D. Miller.)

Mr. Neuner: That letter is Plaintiffs' Exhibit —what it it, 4-a?

Mr. Davis: 3, I think.

The Court: 3 is the letter of Mr. Durham enclosing the application for reinstatement.

Mr. Neuner: Q. I hand you now Plaintiffs' Exhibit 3 and ask you to tell the jury whether or not that was a letter received by you?

A. Yes, it is.

Q. Now then, when you stated that you got the money order, what they asked for, what did you mean?

A. Well, I meant I wanted to make the check good. I immediately got a money order and paid the check. [56]

Q. And I will ask you to tell the jury whether or not that was in compliance with that letter.

Mr. Davis: If the Court please—

A. That was the way that I read it.

Mr. Neuner: Q. Yes. In other words, there is where you got the amount, the suggestion for the \$49.07; is that correct?

A. \$49.07, with interest.

Q. You mailed that when?

A. November 29th—28th.

Q. The date you received it?

A. The day I received this I went uptown in the afternoon.

Q. Do you know whether you wrote any letter or anything?

(Testimony of Reta D. Miller.)

A. I just wrote a little note in it.

Q. Did you keep a copy of that?

A. No, I didn't.

Mr. Neuner: Have you got that note?

Mr. Davis: Yes, I think I have. I think it just said she was enclosing a money order.

Mr. Neuner: Q. Do you recall what you said in that note?

A. I don't. I think I just said, "Enclosed amount for so much", and put my name to it. I think that is all in it.

Q. That was the day after your husband was—

A. Yes.

Q. Now from the time that your husband was injured where was he until the time of his death?

[57]

A. He was in the General Hospital in McMinnville.

Q. Did you see him during that time?

A. I saw him. I didn't talk to him.

Q. Why?

A. Well, he was in an unconscious condition and he didn't talk to anyone either—

The Court: Injured on the 27th and passed away on what day? A. December 3rd.

Mr. Neuner: The 3rd.

The Court: December 3rd.

Mr. Neuner: Q. Now then, that money order was returned to you?

A. After his death.

(Testimony of Reta D. Miller.)

Q. And I believe that is Plaintiffs' Exhibit No. 8. And when did you receive that? You say after his death; what day?

A. December 3rd, in the afternoon. He died in the morning and I received the return of the money order in the afternoon, December 3rd.

Q. I hand you now what purports to be a money order and ask you if that was the document which you obtained? A. Yes, it is.

Q. And where was that obtained?

A. McMinnville postoffice.

The Court: And that was sent back to you?

A. That was returned to me. [58]

Mr. Neuner: Q. How long did you live on the farm?

A. Nearly ten years. It would have been ten years in April.

Q. And where were you first married?

A. In McMinnville.

Q. When? A. December 24th, 1925.

Q. Now we hand you Plaintiffs' Pre-Trial Exhibit No. 6 and ask you to peruse that and state whether or not you know what it is.

A. Yes. This is his check book.

Q. Whose check book?

A. Warren Miller's.

Q. And whose writing is that "New York Life", or whatever it is there on that stub?

A. That is his writing.

(Testimony of Reta D. Miller.)

Q. I wish you would tell the Court and jury what his policy was, if you know, with reference to keeping his check stubs up to date.

Mr. Davis: If the Court please, we object to that as incompetent, irrelevant and immaterial, and not within the issues of this case.

Mr. Neuner: Very well. If they don't want it I won't insist on it.

Q. Now where was the account kept, Mrs. Miller? A. The First National Bank.

Q. Of—? [59] A. McMinnville.

Q. Did he keep any other account there?

A. At times he has had a special account, but he didn't—he has had two accounts at different times.

Q. Well, at the time when this occurred?

A. It was just the one account, L. A. Miller & Son.

Q. And who had access to draw checks against that account?

A. I did and himself. We both drew on it.

Q. Did you have a separate check book, or did you use the same check book that he used?

A. I used the same one, because I seldom wrote a check unless he was away.

The Court: Because what?

A. I only wrote one when he was away. He did all the checking.

The Court: How did that happen to be carried in the name of L. A. Miller & Son?

(Testimony of Reta D. Miller.)

A. Well, that was the name of the firm.

The Court: L. A.?

A. L. A. Miller & Son farm. It was Twin Springs Guernsey Farm.

The Court: L. A. Miller was his father?

A. Yes. He owned the farm.

The Court: But his father didn't check on that account?

A. No, his father didn't check on it.

The Court: Your husband, I believe was stated at the pre-trial—a good many of these things have been gone over, gentle- [60] men, at the pre-trial. You have had experience with that before here in other cases. A good deal of detail was explained to you as we went along, explained to you as to what was admitted at the pre-trial and does not have to be proved here. It was admitted by the parties—and this is very largely a case of that kind, too—it was admitted at the pre-trial that besides farming there your husband had a milk route.

The Witness: Yes.

The Court: In and around McMinnville.

The Witness: Yes.

The Court: And he deposited in this account I suppose his proceeds from the—

A. From everything, yes; L. A. Miller & Son's.

Mr. Neuner: Q. Now when you saw that check, Pre-Trial Exhibit No. 4, or Exhibit No. 4, was that all in the handwriting of your husband, Warren L. Miller? A. Yes.

(Testimony of Reta D. Miller.)

The Court: Have you checked it to make sure of that? Have you looked through it to make sure of that?

A. Through this, you mean?

The Court: Yes.

A. Not until after his death, where I finished writing in there.

The Court: But everything prior to his death there? A. Yes.

The Court: That is in the stubs, is in your husband's hand- [61] writing? A. Yes.

The Court: He had that check book on his person at the time of his injury, do you remember?

A. No.

The Court: What? A. He didn't.

The Court: It was at home?

A. It was at home.

Mr. Neuner: Q. How did they get it?

A. Pardon?

Q. How did they get the check book?

A. It was in the desk.

Q. And you got it? You got the book?

A. This? Well, it was right there, yes, in the desk, when I looked for it.

Q. Well, where was it when he wrote the check to Mr. Yount?

A. Well, he had it in his pocket I suppose that day. He carried it frequently.

Q. Oh, I see. That is what I was getting at.

A. Frequently he did. The day of the accident he didn't.

(Testimony of Reta D. Miller.)

Q. Did anyone else have control or access to the desk or that book? A. No.

Q. Besides you and Mr. Miller?

A. No. [62]

Mr. Neuner: I think you may cross examine.

The Court: We will take the afternoon recess now.

Mr. Neuner: Your Honor, I have two witnesses here to call; if I could take them out of place, it will take just a minute.

The Court: Would you like to do it now?

Mr. Neuner: Yes, I would like to do it before the recess; yes.

The Court: You may step down, Mrs. Miller.

(Witness withdrawn.)

Mr. Neuner: Call Mr. Skulason.

B. G. SKULASON

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Mr. Neuner: We would like to offer that. I didn't offer that check stub in evidence. Have it marked.

Mr. Davis: If the Court please, the defendant objects to the admission of the check stub, for the reason that it is entirely incompetent, irrelevant and immaterial, makes no difference in this case; for

(Testimony of B. G. Skulason.)

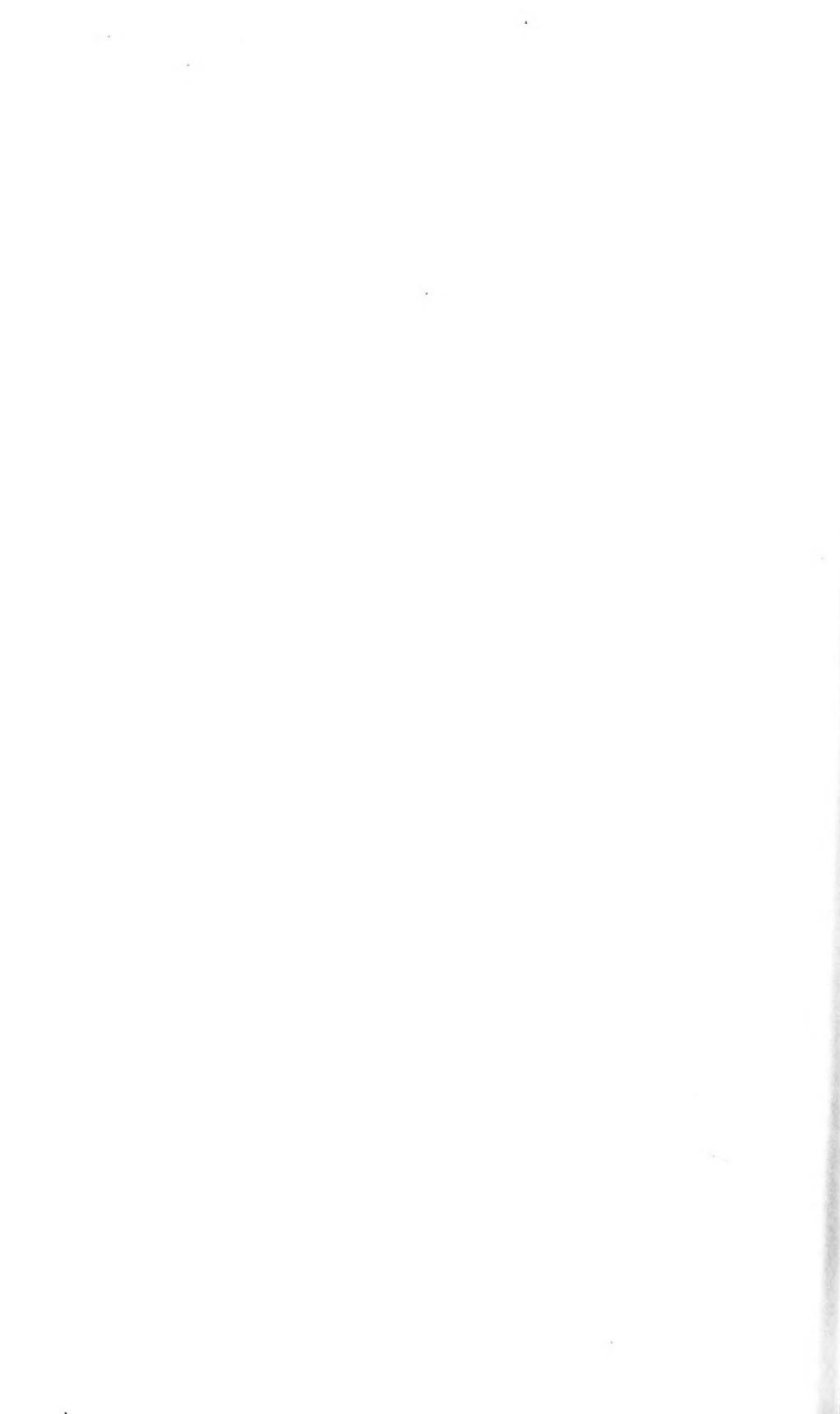
the further reason that it does not show, the testimony does not show that the entries which are made in this book were made at or about the time of the issuance of the check here in question. I think that if it is to serve any purpose at all it would have to be made at the time the check was written. [63]

The Court: It is admitted.

(The check stub so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 6, was further marked "and trial".)



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(Testimony of B. G. Skulason.)

The Clerk: May I have your correct name for the reporter?

The Witness: B. G. Skulason.

Direct Examination

By Mr. Neuner:

Q. Mr. Skulason, what is your profession?

A. I am a practicing attorney at law.

Q. And how long have you practiced that profession? I am not asking your age.

A. Something over forty years.

Q. Are you duly licensed to practice in the State of Oregon? A. Yes.

Q. And during that time you have practiced in the State of Oregon?

A. Over thirty years now in Oregon.

Q. And you maintain an office now in the City of Portland? A. Yes.

Q. In the practice of law? Are you familiar with attorneys' fees to be allowed in suits or actions in courts of law? A. Yes, I am.

Q. In this case, wherein the plaintiff has instituted suit against the New York Life Insurance Company on two life insurance policies, and wherein the first cause of action alleges the first policy [64] for \$3,000, double indemnity in case of accidental death, and a family provision paying \$30.00 per month for a period of twenty years; the second cause of action is on a policy of the same company, the face value of \$2,000—

The Court: Is Mr. Lewis going to be your other witness?

(Testimony of B. G. Skulason.)

Mr. Neuner: Yes.

The Court: Well, I suggest that he listen to this recital so that he may answer on the basis of the same question asked of Mr. Skulason.

Mr. Neuner: Yes.

Q. (Continuing) —the face of \$2,000 with double indemnity in case of accidental death, with a family provision of \$20.00 per month for a period of approximately twenty years. The company denies liability on these policies, claiming a lapsation thereof; and the complaint in the usual form, however an amended complaint was filed, the answer thereto, a couple of pre-trial conferences were had in connection therewith, briefs were prepared on both sides and the general preparation in connection with the submission of the cause to the jury. The complaint alleges in the first cause of action a reasonable attorneys' fee of \$1500 and on the second cause of action a reasonable attorneys' fee of \$1000. Now based upon your experience as a trial lawyer, what would you say would be a reasonable fee to be allowed the plaintiff in case she prevails in this action?

The Witness: May I ask a question? [65]

Mr. Neuner: Yes.

The Witness: Are the issues the same in the two causes of action?

Mr. Neuner: Yes.

The Witness: What would be the gross amount of the recovery in case the plaintiff prevails in the first cause of action?

(Testimony of B. G. Skulason.)

Mr. Neuner: Oh, I suppose it will be around eighteen or twenty thousand, wouldn't it?

Mr. Davis: On the first?

Mr. Neuner: On the two.

Mr. Davis: On the two of them, yes, somewhere in that neighborhood.

The Witness: And what are the prospects as to the length of time this will take in this Court?

The Court: Today and tomorrow. There have been two extensive pre-trials, and the briefs are extensive, involving difficult questions.

A. Well, I think that \$3,000.00 in both causes of action would be a reasonable fee, dividing that between the two in proportion to the amounts involved.

Mr. Neuner: You may cross examine.

Cross Examination

By Mr. Huntington:

Q. Mr. Skulason, if the case involves principally one issue, and that is the question of whether or not certain premiums were paid, [66] and the trial principally around that issue, what would you say then as to the fee, keeping in mind that there was the same issue in both causes of action?

A. Well, I consider the amount involved and the result, and the eminence of counsel for the plaintiff; I take into consideration all the elements the Supreme Court has laid down in the fixing of attorney fees, and I think that would be about right, three thousand dollars.

(Testimony of B. G. Skulason.)

Q. Did you take into consideration the amount of time involved? A. Yes.

Q. About how much time?

A. Well, from what has been stated here, I don't know how much time has been taken or required outside of court, but in a case of this kind, according to my experience the work is done before even the pre-trial procedure begins, in the office. A case of this kind requires very close and careful analysis of the facts and the law, and requires a high type of legal talent to take care of it properly. I think they would be entitled to \$3,000 if they prevail in this case.

Q. Have you in mind the per diem schedule of the state court?

A. No, I haven't. I didn't think of that. That is with reference to contingent fees mostly.

Q. Well, the per diem schedule?

A. Oh, the per diem schedule?

Q. So much per day. [67]

A. Oh, I don't remember what that is.

Q. You don't know whether it is fifty dollars a day?

A. Well, if it is fifty dollars a day it is clear out of reason. If it is fifty dollars a day it is clear out of reason for a case of this kind.

Mr. Huntington: That is all.

(Witness excused.)

ARTHUR H. LEWIS

was thereupon produced as a witness in behalf of the plaintiffs and, having been first duly sworn, testified as follows:

Direct Examination

The Clerk: Arthur H. Lewis?

The Witness: Arthur H. Lewis.

By Mr. Neuner:

Q. Mr. Lewis, you are a lawyer?

A. Yes, sir.

Q. How long have you been in the practice of law? A. Thirty years.

Q. Where? A. Portland, Oregon.

Q. That entire time? A. That entire time.

Q. And your father before you was—

A. My father before me was a lawyer, yes. [68]

Q. During your experience have you ever had occasion to pass upon what is a reasonable attorney fee in different kinds of litigation?

A. I have.

Q. Did you hear my statement to Mr. Skulason?

A. I did.

Q. Now adding to that statement, assuming in addition to what I have stated that it has taken considerable time for the preparation of the case, the exact time, as you know from your experience as a practical lawyer, it is nearly impossible to state, but covering off and on over a period of six months, what would you say would be a reasonable attorneys' fee to be allowed the plaintiff in case she prevails, in a case of this kind?

(Testimony of Arthur H. Lewis.)

A. I believe twenty-five hundred dollars would be a reasonable fee.

Mr. Neuner: You may cross examine.

Cross Examination

By Mr. Huntington:

Q. Mr. Lewis, have you ever had offices with Mr. Neuner?

A. Yes; young George Neuner, yes; not Mr. Neuner, senior.

Q. And is that true at the present time, or what is the arrangement?

A. Yes. George Neuner has a desk and an office there with us, Mr. Moore and myself; although at the present he is down at the Attorney General's office. [69]

Mr. Huntington: I think that is all.

(Witness excused.)

The Court: Now gentlemen of the jury, the afternoon recess.

(The jury here retired and the following proceedings were had without the presence of the jury:)

The Court: These questions that are reserved you had better discuss now. There are several. Do you desire to press the inquiry, Mr. Neuner, that you started to make of Mr. Yount about custom in the past as between him and the deceased, with re-

gard to the payment of premiums? That was one of the questions you reserved.

Mr. Neuner: Yes. I don't think it is necessary, your Honor, with the turn the matters have taken. However, I want to introduce that note, for the reason that it is stamped by the New York Life Insurance Company and I want it to go in on the proposition that these acts of the agent are ratified and all done with knowledge of the company.

The Court: Which note is that?

Mr. Neuner: That is the note given for the boy's insurance.

The Court: I dont' need to see it, Mr. Neuner. Do you have in mind, Mr. Davis, what it is?

Mr. Davis: Yes, I have in mind what it is.

Mr. Neuner: I don't know whether there will be any objection to that. [70]

Mr. Davis: There certainly will.

Mr. Neuner: I would be surprised if there wasn't. But I might state that these agents run loose around through the country and do everything under the sun—I think I am permitted to state that, the jury not being here—and the company of course urges them on.

The Court: It depends on how loud you talk.

Mr. Neuner: Well, I will try not to talk loud.

The Court: I know when your enthusiastic spells are coming on.

Mr. Neuner: And I believe that we are entitled to show that, but I don't want to urge it if there is any question about the admissibility of it. I

think perhaps we would be entitled to it. I don't know whether it would be of any assistance to the jury. It would merely amplify the record in connection with these dealings. If we are going to be confined just to the one transaction, and if that is the issue, why, then of course it would be doubtful whether it would be admissible.

The Court: I don't believe it should go in.

Mr. Neuner: Very well. I will forego it.

The Court: Not that I am trying the case, Mr. Neuner.

Mr. Neuner: I know. I don't claim enough for it to take a chance.

The Court: Was there anything else reserved?

Mr. Neuner: The only other thing that was reserved was that [71] statement which I refrained from asking Mrs. Miller, and as I stated before.

The Court: What statement?

Mr. Neuner: The statement that her husband made to her.

The Court: That evening?

Mr. Neuner: Yes.

The Court: I have thought very seriously about that and taken advice with my colleague during the noon hour, as I am often helped by him, and I doubt the admissibility of that statement.

Mr. Neuner: Very well. I will forego that. So there is nothing else that I know of. Oh, the check. I offered that and I think there was an objection, but I think your Honor admitted that.

The Court: Yes, I admitted that.

Mr. Davis: That was admitted over objection.

The Court: That was admitted over objection.

Mr. Davis: There is just one question I wanted to ask, if the Court please. These exhibits I take it that are identified in the pre-trial order, it is not necessary to have them further identified on the stand to introduce them?

The Court: You could offer them in gross right now on each side, if you wanted to, which is often done, subject to objection by the adverse party as to their materiality and competency as to those exhibits where they do desire to object. That is often done. [72]

Mr. Davis: You want to do that now?

Mr. Neuner: Yes.

Mr. Davis: Well, supposing you go ahead.

Mr. Neuner: Well, we will offer Pre-trial Exhibit 5, which is the bank statement which we were asked to produce.

Mr. Davis: There is no objection to that.

The Court: It is admitted.

(The statement headed "L. A. Miller & Son, Warren L. Miller, McMinnville, Ore., in account with The First National Bank of McMinnville," so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 5, was further marked "and trial".)

PLAINTIFFS' EXHIBIT No. 5

L. A. MILLER & SON WARREN L. MILLER McMINNVILLE, ORE.

In Account with The First National Bank of McMinnville, McMinnville, Oregon

Date	Checks in Details	Deposits	Date	Balance
Nov. 1 '40	7.00—		Oct. 31 '40	278.60
Nov. 2 '40	15.20—	55.67—	Nov. 1 '40	271.60*
Nov. 2 '40	24.00—	30.00—		
Nov. 3 '40	100.00—	15.20—	Nov. 2 '40	141.08*
Nov. 6 '40	10.00—	10.13—	Nov. 3 '40	44.13*
Nov. 7 '40	7.00—	13.77—	Nov. 6 '40	102.15*
Nov. 7 '40	12.01—	15.20—		
Nov. 8 '40	12.00—	1.00—	Nov. 7 '40	54.17*
Nov. 9 '40	14.68—		34.23	Nov. 8 '40
Nov. 12 '40	1.50—	6.75—	Nov. 9 '40	75.40*
Nov. 13 '40	7.69—	15.20—	Nov. 12 '40	60.72*
Nov. 14 '40	12.25—	30.02	Nov. 13 '40	37.27*
			Nov. 14 '40	59.60*
				31.60*

Date	Checks in Details	Deposits	Date	Balance
Nov. 15 '40	4.95—	15.20—	Nov. 15 '40	11.45*
Nov. 16 '40	3.00—	55.90—	Nov. 16 '40	9.20*
Nov. 18 '40	8.53—		Nov. 18 '40	.67*
Nov. 19 '40	1.25—	35.00—	Nov. 19 '40	6.75 OD
Nov. 20 '40	8.75—	15.20—	Nov. 20 '40	1.05*
Nov. 22 '40	3.03—	28.83	Nov. 22 '40	26.87*
Nov. 25 '40	9.03—	31.75	Nov. 25 '40	17.84*
Nov. 27 '40	35.00—	28.85	Nov. 27 '40	7.96*
Nov. 28 '40	.93—	25.12	Nov. 28 '40	7.03*

Please Examine.

If Not Correct, Report at Once

If no error is reported within 10 days this account will be considered correct.

Please advise if name or address is incorrect.
This Is Important.

The Last Amount in This
Column Is Your Balance

Vouchers Returned 37

[Endorsed]: Filed Jan. 21, 1942.

The Court: Let me fix in my mind as we go along now what the bank statement shows and what each side contends for that.

Mr. Neuner: On the 13th of November there was \$59.60 balance. On November 20th, the date reputedly the check was presented for payment, there was a balance of \$1.05. On November 22nd, the date that the endorsement was canceled——

The Court: In town?

Mr. Neuner: Here, there was a balance of \$26.87, and then it was reduced down to \$7.03 November 28th, the day following the accident.

The Court: There was never enough money in it to cover the check after the—— [73]

Mr. Neuner: After the 13th?

The Court: Yes.

Mr. Neuner: That is correct.

The Court: And the check stubs, is my memory correct that they show that there was at all times?

Mr. Neuner: I dont' think, your Honor, that the stubs show that. I didn't look through, but we can't tell for the reason that the check stubs are not dated.

The Court: Let me put it this way: It seems to me I saw that exhibit and that every balance there is a true balance; there is no overdraft shown there; there is a balance shown there at all times?

Mr. Neuner: That is correct, on the check stubs.

The Court: That is what I am getting at.

Mr. Neuner: I think that is correct. I didn't look through it.

The Court: Is that the way you read those check stubs, Mr. Davis and Mr. Huntington?

Mr. Davis: Pardon me?

The Court: I looked through that at one time, I am pretty sure, and it showed a constant balance.

Mr. Davis: I don't recollect now what it did show.

The Court: It does not show an overdraft any place?

Mr. Davis: I don't believe it did.

The Court: And it shows a deduction for every check taken out [74] of the book?

Mr. Neuner: No, not every one.

The Court: Not every one?

Mr. Neuner: No. Here is one December 9th, 1940.

Mr. Davis: May I see it?

Mr. Neuner: But that was way after.

Mr. George Wm. Neuner: That was when Mrs. Miller was using it.

Mr. Neuner: Yes. That was Mrs. Miller.

The Court: I think I looked at that book at one time in an effort to satisfy myself somewhat about the deceased.

Mr. Neuner: There is no date on the check stub after the New York Life.

The Court: But there are a series of balances carried forward there.

Mr. Neuner: Yes.

Mr. Huntington: May I see it?

The Court: And just taking that—I don't know that it concerns me particularly, but for clarification here, just standing alone, it would indicate that the man thought he had a balance all the time. He carried balances forward there and they were all affirmative balances.

Mr. Davis: Of course, your Honor, the check is written in pen and ink and this entry with respect to New York Life is a pencil memorandum. I think I am right. Yes, it is a pencil memorandum. There is no testimony as to just when he made that [75] entry.

The Court: That is a matter of argument for you. Now what else have we reserved? Yes, you were offering your exhibits.

Mr. Neuner: Yes. I offer Exhibit 7, the Standard Certificate of Death.

The Court: Is there any objection?

Mr. Davis: No.

The Court: Admitted.

(The certified copy of death record of Warren LeRoy Miller, so offered and received, having been previously marked Plaintiffs' Pre-Trial Exhibit 7, was further marked "and trial".)

Mr. Neuner: I think we had marked as Exhibit 9 a letter. I don't know whether they have any objections to it or not.

Mr. Davis: Yes, there is objection.

Mr. Neuner: All right. We will withdraw it. That does away with that. I think those are our exhibits.

The Court: How about Yount's letter, No. 9?

Mr. Davis: We objected to that and they withdrew it.

Mr. Neuner: Which one?

Mr. Davis: Mr. Yount's letter. Isn't that what you just said?

Mr. Neuner: Yes. That is all.

The Court: Gentlemen, look at page 8 of the pre-trial order. There are a few clerical corrections to be made, I think.

Mr. Neuner: There is what? [76]

The Court: Paragraphs 8 and 9 refer to a number 8-a in both cases.

Mr. Huntington: Yes, there is.

The Court: Take Paragraph 8, shouldn't that be Exhibit No. 8 rather than 8-a?

Mr. Huntington: No. If the Court please, there were three of them. There wasn't any 8; there was an 8-a, an 8-b and an 8-c.

The Court: Well, 9 is 8-a also.

Mr. Davis: Well, I think what they intended there was that Plaintiffs' Pre-Trial Exhibit 8-a accompanied by an envelope in which it was mailed

marked Plaintiffs' Pre-Trial Exhibit 8-b, then the money order 8-c.

The Court: But 8 refers to 8-a as Mr. Durham's letter.

Mr. Davis: Yes. Then they are saying that Mr. Durham's letter was accompanied by an envelope.

The Court: All right.

Mr. Neuner: Yes.

The Court: Now look on page 3; how about your dates in paragraph 7?

Mr. Neuner: I think that word "terminating" should be "commencing".

Mr. George Wm. Neuner: That is in line 24.

The Court: The date in line 19 is wrong, the first date.

Mr. Davis: That is what I am trying to check now. That is right, the 29th of February, 1940. [77]

Mr. Neuner: Yes, that is right.

The Court: How about your date then in line 24? That should be 1940 instead of 1939 in line 24.

Mr. Neuner: No.

Mr. Davis: No. The policy reads 1939, if the Court please. You see, they dated this policy back to give him the benefit of a younger age.

The Court: I see.

Mr. Neuner: Yes, that is right.

The Court: Anyhow, you know I read the pre-trial order.

Mr. Davis: That is right.

The Court: Now your exhibits, Mr. Davis.

Mr. Davis: Now, if the Court please, defendant will offer Defendant's Pre-Trial Exhibits 10 and 11 in evidence, which are the official premium receipts.

Mr. Neuner: Objected to as being immaterial, incompetent and irrelevant to the issue in this case.

The Court: Those are the two Mr. Durham mailed out?

Mr. Davis: Yes.

The Court: When he deposited the check?

Mr. Davis: Yes.

The Court: They are admitted.

Mr. Neuner: Exception.

The Court: Not necessary.

(The official premium receipt for \$28.62, on Policy [78] No. 17,395,774 Q7, dated October 17, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 10, was further marked "and trial"; and Official Premium Receipt for \$20.10 on Policy No. 17,395,775 Q7, dated October 17, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 11, was further marked "and trial".)

OFFICIAL PREMIUM RECEIPT

NEW YORK LIFE INSURANCE COMPANY

HOME OFFICE 51 MADISON AVENUE, NEW YORK N.Y.

RECEIVED, WITH THANKS, THE PAYMENT SPECIFIED BELOW

	POLICY NUMBER	
PREMIUM \$	28.62	17 395 774 Q7
INTEREST ON LOAN OR NOTE		DATE DUE 17 DAY OF OCT. 1939
WARREN L MILLER		
GENERAL DELIVERY		
MC MINNVILLE ORE		

IF REMITTANCE OTHERWISE THAN IN CASH
HAS BEEN MADE THIS RECEIPT SHALL BE
VOID IF PAYMENT OF SUCH REMITTANCE IS
NOT ACTUALLY RECEIVED BY THE COMPANY

COUNTERSIGNED BY



A. W. Person
PRESIDENT
FOR CASHIER OREGON BRANCH OFFICE

3472 R. B. APRIL 1939

The annual election of Directors of this Company is held at its Home Office on the second Wednesday in April of each year. The law provides that if no independent nominations are made no votes shall be cast or counted except for candidates nominated by the Board of Directors. The polls are open from 10 A.M. to 4 P.M. and every policyholder whose insurance is in force and has been in force at least one year prior thereto is entitled to vote at such election as provided in Section 94 of the Insurance Law of the State of New York. Any policyholder desiring to vote by mail will receive a ballot and instructions upon application to the Home Office.

There are twenty-four elected Directors and eight are elected annually to serve for three years. Independent nominations may be made by groups of policyholders at least five months prior to the election as provided in Section 94 of the Insurance Law of the State of New York.

Anybody desiring any further information regarding elections should address the Superintendent of Insurance, Albany, New York, under whose supervision all elections are conducted.

April 2 - 1939

G. H. Nichols
G. H. Nichols
3472-R. B. April, 1939.

BY DEPUTY



OFFICIAL PREMIUM RECEIPT

NEW YORK LIFE INSURANCE COMPANY

HOME OFFICE 51 MADISON AVENUE, NEW YORK N.Y.

RECEIVED, WITH THANKS, THE PAYMENT SPECIFIED BELOW

PREMIUM \$	POLICY NUMBER	DATE DUE
20.10	17 395 775 Q7	17 DAY OF OCT. 1940
INTEREST ON LOAN OR NOTE		
WARREN L MILLER		
GENERAL DELIVERY		
MC MINNVILLE ORE		

IF REMITTANCE OTHERWISE THAN IN CASH
HAS BEEN MADE THIS RECEIPT SHALL BE
VOID IF PAYMENT OF SUCH REMITTANCE IS
NOT ACTUALLY RECEIVED BY THE COMPANY

COUNTERSIGNED BY



Albert L. Eiken
PRESIDENT

E. Fogland
FOR CASHIER OREGON BRANCH OFFICE

3472 R B APRIL 1939

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Anyone desiring any further information regarding elections should address the Superintendent of Insurance, Albany, New York, under whose supervision all elections are conducted.

JAN 2 1940

G. H. Marsh Clerk

3472-R. B. April, 1939.

DEPUTY



DEFENDANT'S
PRE-TRIAL and Trial
EXHIBIT 11

C. No. 724
A. W. PERSON
Reporter

Mr. Davis: Next, if the Court please, is Defendant's Pre-Trial Exhibit 12, which is the deposit slip showing the deposit of this check in the United States National Bank.

Mr. Neuner: No objection.

The Court: Admitted.

(The duplicate deposit slip of New York Life Insurance Company with United States National Bank, dated November 18, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 12, was further marked "and trial".)

DEFENDANT'S EXHIBIT No. 12

New York Life Insurance Company
Deposited by Portland, Oregon, Branch
For Credit of
New York Life Ins. Co. Account
With
U. S. National Bank

Date Deposited 11/18/40 \$9734.95
Date Previous Deposit 11/16/40 \$6261.37

R. A. DURHAM

Cashier

Carbon Copy is to be approved by Bank and sent to Home Office in Voucher Envelope No. 5407.

Coin

Bills

Checks (Give location of bank)

24-82	Portland	81.92
24-4	Portland	21.71
24-4	Portland	29.46

24-11	Portland	.....	42.65
24-4	Portland	.....	16.04
96-101	Tillamook	.....	12.14
24-6	Portland	.....	53.26
96-17	E.	.....	390.64
24-11	Portland	.....	49.56
24-11	Portland	.....	58.57
24-11	Portland	.....	2641.50
24-11	Portland	.....	90.71
	Portland, Oregon	.....	45.70
24-6	Portland	.....	30.44
24-6	Portland	.....	34.37
24-6	Portland	.....	20.41
96-64	Klamath Falls	.....	7.84
96-198	Merrill	.....	19.84
96-17	E.	.....	13.00
98-85	Renton, Wn	.....	28.47
36-334	The Dallas	.....	192.90
96-48	Corvallis	.....	30.24

9734.95

24-11	Portland	.....	1500.00
11-1	San Francisco	.....	2.50
24-6	Portland	.....	25.00
24-11	Portland	.....	10.00
24-11		.....	8.00
24-70	Portland	.....	5.00
24-11		.....	5.38
24-11		.....	14.85
96-48	Corvallis	.....	13.50
[96-67	McMinnville	.....	48.72]
96-274	Marsh.	.....	31.40
96-17	E.	.....	36.36
24-4	Portland	.....	63.03
24-19	Portland	.....	12.61
24-52	Portland	.....	51.27
96-113	Condon	.....	94.92
96-339	Heppner	.....	238.91
M. O.		.....	26.69
96-2	Salem	.....	49.60

96-113	Condon	.....	13.34
96-165	Dufur	.....	13.54
96-321	Newport	.....	35.08
96-285	Lakeview	.....	38.75
24-11	Portland	.....	153.60
24-4	Portland	.....	33.54
M. O.	.....	.....	29.11
96-76	Dallas	.....	6.65
98-217	Vancouver, Wn.	.....	10.79
96-172	Fossil	.....	68.37
M. O.	.....	.....	10.19
24-4	Portland	.....	13.51
96-165	Dufur	.....	13.51
16-189	Los Angeles	.....	37.75
96-33	Albany	.....	16.19
96-1	Salem	.....	6.26
96-1	Salem	.....	6.30
M. O.	.....	.....	8.30
99-25	Rock Springs, Wyo...	.....	12.64
24-62	Portland	.....	104.82
M. O.	.....	.....	11.05
24-69	Portland	.....	6.69
96-1	Salem	.....	66.20
96-1	Salem	.....	16.78
96-338	Pendleton	.....	82.26
M. O.	.....	.....	7.66
24-11	Portland	.....	15.94
M. O.	.....	.....	9.17
M. O.	.....	.....	13.20
M. O.	.....	.....	35.24
M. O.	.....	.....	25.74
M. O.	.....	.....	21.45
96-1	Salem	.....	33.63
96-206	Mt. Angel	.....	22.42
96-17	E.	.....	8.82
96-274	Marsh.	.....	9.15
244	Portland	.....	34.76
96-86	Lebanon	.....	8.54
M. O.	.....	.....	15.41

24-11	Portland	.....	27.11
24-69	Portland	.....	9.01
24-52	Portland	.....	17.85
24-82	Portland	.....	19.79
96-94	Silverton	.....	25.95
96-45	Roseburg	.....	7.95
24-4	Portland	.....	37.40
24-4	Portland	.....	43.45
M. O.	.....	.....	63.05
96-1	Salem	.....	8.29
86-17	E.	.....	32.16
96-343B.	.....	.....	64.35
24-4	Portland	.....	15.61
M. O.	.....	.....	6.44
M. O.	.....	.....	17.00
24-62	Portland	.....	13.56
24-4	Portland	.....	40.92
96-1	Salem	.....	14.91
96-291	Tigard	.....	72.70
24-11	Portland	.....	153.80
24-4	Portland	.....	8.00
24-52	Portland	.....	20.00
24-11	Portland	.....	25.00
Portland, Oregon	.....	.....	25.30
96-291	Tigard	.....	40.00
96-72	Hood River	.....	14.55
96-17	E.	.....	9.40
96-2	Salem	.....	11.10
96-24	Medford	.....	12.36
96-64	Klamath Falls	.....	5.07
24-6	Portland	.....	84.98
96-287	St. Helens	.....	34.60
24-6	Portland	.....	16.93
96-74	Newberg	.....	12.32
96-17	E.	.....	13.58
96-49	Corvallis	.....	35.00
96-48	Corvallis	.....	40.00
96-24	Medford	.....	31.00
96-10	Salem	.....	8.00
M. O.	.....	.....	2.00

96-11	Astoria	143.47
24-6	Portland	17.76
96-48	Corvallis	9.34
96-19	E.	7.06
96-72	Hood River	44.73
24-11	Portland	76.55
96-64	Klamath Falls	25.90
96-17	E.	32.84
96-16	Astoria	24.48
M. O.	.....	9.73
M. O.	.....	10.30
M. O.	.....	8.34
96-316	Oswego	7.66
M. O.	.....	7.48
96-11	Astoria	9.63
24-19	Portland.....	22.88
M. O.	.....	5.45
96-47	Roseburg	11.20
24-11	Portland	77.58
24-19	Portland	5.36
24-11	Portland	30.42
96-57	Albany	22.09
96-274	Marsh.	35.05
M. O.	.....	31.19
M. O.	.....	6.28
92-39	Twin Falls, Idaho....	6.70
96-62	Marsh.	48.33
M. O.	.....	8.32
96-109	Prineville	20.39
M. O.	.....	6.05
96-165	Dufur	18.11
96-49	Corvallis	8.54
M. O.	.....	11.49
96-287	St. Helens	27.98
96-64	Klamath Falls	[Illegible]
M. O.	.....	9.85
M. O.	.....	30.70
96-274	Marsh.	36.56
M. O.	.....	13.96

96-72	Hood River	7.88
96-274	Marsh.	6.60
M. O.	.....	10.37
96-84	Cottage Grove	43.30
21-4	Portland	14.16
24-4	Portland	36.90
24-4	Portland	93.90
24-4	Portland	19.64
24-81	Portland	28.68
M. O.	.....	31.44
M. O.	.....	26.68
24-11	Portland	26.32
96-2	Salem	72.33

[Endorsed]: Filed Jan. 21, 1942.

Mr. Davis: We now offer Defendant's Pre-Trial Exhibit No. 13, which is a slip marked "Returned by First National Bank, McMinnville, Oregon", for the reason as checked "not sufficient funds".

Mr. Neuner: We object to that as being immaterial.

The Court: Admitted.

(The slip headed "Returned by First National Bank, McMinnville, Ore.", so offered and received, [79] having been previously marked Defendant's Pre-Trial Exhibit 13, was further marked "and trial".)

RETURNED BY

FIRST NATIONAL BANK 96-67

McMINNVILLE ORE.

TO

FOR REASON UNDERLINED

Not sufficient funds	Missing endorsement	JUDY 6 H. O. TOWN
No account	Payment required	Signature unsatisfactory
Post dated	Savings account	Signature unauthorized
Not on us	Guarantee endorsement	Signature missing
Account closed	Not properly endorsed	Drawn on uncollected funds

Personal endorsement required

Refer to maker

DISTRICT &
DISTRICT OF OREGON
F. I. K. D.

JAN 21 1942



Mr. Davis: We now offer Defendant's Pre-Trial Exhibit No. 14, which is a Return Item Memo, showing one other item and showing the amount \$48.72.

Mr. Neuner: What do you claim for that?

Mr. Davis: Nothing more than just to show the papers that came through in the transaction.

Mr. Neuner: Objected to as being immaterial.

The Court: It is admitted.

(The Return Item Memo dated November 22, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 14, was further marked "and trial".)



RETURN ITEM MEMO

DATE NOV 22 1940

NAME

M. J. Life Insurance Co.

COLLECT

PHONE

SECURE

FORM 400

Today	75	33
	48	72

TILLMAN

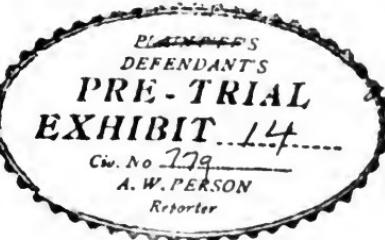
D

TILLMAN

DEPUTY
BYU. S. DISTRICT COURT
DISTRICT OF OREGON
F. B. I. F. D

JAN 21 1942

G. H. Monk, Clerk



and local

Mr. Davis: We now offer Defendant's Pre-Trial Exhibit No. 15, which is a check issued by New York Life Insurance Company to United States National Bank taking up this NSF check in question and some others.

Mr. Neuner: The same objection.

The Court: Admitted.

(The canceled check of New York Life Insurance Company dated November 25, 1940, for \$133.27, payable to U. S. National Bank, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 15, was further marked "and trial".) [80]



NOV 25 1940

PORTLAND, ORE.

N.O.G. 2100

NEW YORK LIFE INSURANCE COMPANY

OREGON BRANCH OFFICE

J. H. G. A.
#1606209-Kinder
#1330775-Kinney
#173957745-Miller

PAY TO THE
ORDER OF

\$133.77

DOLLARS

NEW YORK LIFE INSURANCE COMPANY, Account No. 2

To THE UNITED STATES NATIONAL BANK
24-11 PORTLAND, OREGON

C. M. TURNER, BRANCH OFFICE



U. S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND

JAN 21 1942

G. H. Moore Esq.

BY

D. SPURR



Mr. Davis: If the Court please, at this time we are not introducing Defendant's Pre-Trial Exhibits 16, 17, 18, 19 and 20, unless it should become necessary by reason of further testimony of plaintiff. We now offer in evidence Defendant's Pre-Trial Exhibit 21, which is a copy of the original entry on Daily Premium and Commission Report of the New York Life Insurance Company for November 18, 1940. We understand from council that he is not objecting to this because it is a copy.

Mr. Neuner: Not as to identification. I have got an objection to it.

Mr. Davis: Yes.

The Court: Admitted.

Mr. George Wm. Neuner: If your Honor please, we would like to be heard on the introduction of Nos. 20, 21 and 22, which are the private records of the defendant Life Insurance Company.

The Court: 20 has not been offered.

Mr. Davis: No.

Mr. George Wm. Neuner: I meant 21 and 22. I presume you are offering 22?

Mr. Davis: We will offer both 21 and 22 so that he might make the same objection to both of them.

The Court: All right.

Mr. George Wm. Neuner: It has been held, your Honor, in two cases, one as late as 1941, a New Jersey law case, and the other one an Illinois case, not the Illinois Appellate Court [81] this time, in 1925, and I find no contrary holdings, in which this

very point was raised, in which the company sought to bring in its daily records in order to establish I presume the fact that certain things were done, and if I may be permitted to read very briefly from the holdings of those two cases——

The Court: I don't see why you are objecting to these. These seem to me to tend to prove your case. They are in line with your theory.

Mr. George Wm. Neuner: They are opposed, at least as to the first one. The second one probably won't hurt us; the first one being brought in on the theory that the first time the company itself had anything to do with the check was when it reached their books, which was on the 18th, I think, which this particular record will show, whereas our contention is that it reached the company on the 13th and they are seeking to bring these in to show how they dealt with this particular account, which is clearly self-serving in its nature, and it has been so held by the authorities that I just mentioned.

The Court: Go ahead. You want to read some authorities?

(Mr. George Wm. Neuner read from Baxter v. Metropolitan Life, 149 N. E. 243, and Barbera v. John Hancock, 21 Atl. (2d) 223.)

The Court: I think they should both come in; if not as a matter of fairness, if that were not enough, they would come in on the same principle that the deceased's check stubs came in, [82] the record of the transaction of the parties.

Mr. Neuner: We have the same objection——

The Court: They are both being admitted over the objection, which is recorded.

Mr. Neuner: Yes.

The Court: Exceptions are automatic under the New Rules.

(The copy of original entry on Daily Premium and Commission Report of New York Life Insurance Company for November 18, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 21, was further marked "and trial", and the copy of original entry on Daily Premium and Commission Report of New York Life Insurance Company for November 26, 1940, so offered and received, having been previously marked Defendant's Pre-Trial Exhibit 22, was further marked "and trial".)

NEW YORK LIFE INSURANCE COMPANY

Daily Premium and Commission Report

Entries on this sheet made by

by John Coates

✓ Litchfield Cash

Division

F

OREGON

Branch Office

Particulars **Date** **Debit** **Credit** **Balance**

11-17 10-17 S.E. June - Miller 10-17 395774 Q
47 12-17 122 00 44 775Q

286 2862 286
201 2010 201

400



942.8 421 842 1415 1481 52 994 9862 1413

Page 18

180

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The Court: We might kind of cast ahead here. How long will your case from the witness stand take?

Mr. Davis: The defendant's?

The Court: Yes. I suppose you are going to want to be heard, and maybe rather fully, on your view of the law that there is no case for the jury here?

Mr. Davis: We will want to make that argument.

The Court: Yes. And it may be you may want to make that at [83] the close of plaintiffs' case. That is one of the questions you had just as well decide now as later, because Mr. Neuner is about at the end of his case now.

Mr. Davis: We had considered that proposition of making the motion at the close of his case. We have introduced our exhibits, which are part of our case, and we don't believe that the testimony we will have will help them any, so—

The Court: At the close of the whole case, then?

Mr. Davis: Yes.

The Court: Including the rebuttal, if any. Now the question is, about how long will your case take from the stand?

Mr. Davis: Probably not over half an hour.

The Court: We may get through with all the testimony then this afternoon?

Mr. Davis: I would think so.

Mr. Huntington: Except, if the Court please, we will have to get an attorney up here. I have

arranged for him to be available but he may get away if we don't hit along pretty fast.

The Court: Yes.

Mr. Huntington: Will the Court hold until five?

The Court: We will do whatever is convenient. Would it be possible to make legal arguments this afternoon? I have heard this case pretty fully at the pre-trial; I have studied it pretty hard and my mind is not closed but I formed an opinion about it a pretty good while ago. [84]

Mr. Huntington: We could try to get the attorney. If not, we could close except for that testimony. Then we could present our motion.

The Court: All right. We will probably be ready, if the arguments are concluded, to submit it the first thing in the morning to the jury. Now then, if it is to be submitted are instructions prepared?

Mr. Davis: We have prepared some.

The Court: Have you prepared instructions?

Mr. Neuner: Yes.

The Court: We will take a few minutes, then you close, and then you put on your testimony. By the way, I want to say that this pre-trial order I thought was a fine piece of work on both sides, as well as the briefing. Really I mean that.

Mr. Neuner: If your Honor knew how we sweat over that you would agree with us that it is a very merited comment from the Court.

Mr. Davis: And duly appreciated.

Mr. Neuner: And duly appreciated.

The Court: I think, if I am ever called on to write anything out and have it printed growing out of this case, I will cite this pre-trial order as a model. Judge Fee did that a while back, and I think that is very worthy of it? Now in signing the pre-trial order I call your attention to the language of Rule 16, which is our rule on pre-trial procedure, "Such order [85] when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." Our view here is that the pre-trial order supersedes the pleadings. Our conservative lawyers—and most lawyers are inclined to be conservative—go back and patch up their pleadings, as Mr. Neuner did this morning, to accord with developments at the pre-trial conference. That is not an unusual thing, but I doubt very much myself—I may be getting a little out of bounds in making this statement, but I doubt very much if that is necessary under this procedure. We don't read the pleadings to the jury any more, as is done I believe still in the state practice, and used to be done here under the Conformity Act; nor do we send our pleadings to the jury room, nor for that matter do we send the pre-trial order to the jury room. Generally speaking, we treat the pre-trial order as superseding the pleadings, and in signing this, as in signing other pre-trial orders, that is the thought I had in mind.

Mr. Davis: Does the pre-trial order go to the jury?

The Court: No.

Mr. Davis: Do they get to be advised of the admitted facts?

The Court: Yes. Oh, we all pick that up among ourselves. You do it in your argument, and I try to fill in any gaps here by calling attorneys' attention to it, so it works out satisfactorily that way. [86]

Mr. Davis: If the Court please, with respect to the pleadings and the amendment which was offered by plaintiffs, in reviewing our answer to the amended complaint I think that our answer to that paragraph would fit in with the allegations of the amendment to the amended complaint, with the exception that they allege there that they gave a check; but in view of the late amendment I think that our answer could stand as a denial of the amendment to the amended complaint.

Mr. Neuner: Yes. That is agreed to.

The Court: Now, gentlemen, in case the case is submitted I won't know, until I see your instructions and hear your arguments on them, just how particularly the plaintiffs are going to claim the right to argue this case to the jury and how the plaintiffs are going to feel I should submit it. Now that has some relation to the comment I have just made about the pleadings and the pre-trial order, because, frankly, gentlemen, the pre-trial order states broader issues than the pleadings do. The pleadings are drawn on the basis of payment. The pre-trial order states broader issues—payment,

as I read it, and, in the alternative, waiver, estoppel, ratification.

Mr. Davis: Well, we don't so recognize the pre-trial order as stating anything there that would constitute waiver or estoppel, or any facts that amount to ratification. Now that is our position.

The Court: Just say that again, will you, just what you have [87] said.

Mr. Davis: It is our position that the pre-trial order does not show any facts which constitute a waiver or an estoppel or ratification. It merely states that the plaintiffs' contentions are that, but we don't agree that there are any facts in there from which a waiver could be—

The Court: No, I understand.

Mr. Davis: Or that there is any issue of waiver made up.

The Court: I understand. What?

Mr. Davis: Or that there is any issue of waiver made.

The Court: That, what you have just said, is different from what you said a minute ago. What you said a minute ago was you didn't agree there was waiver. Now you have said you don't agree there is any issue of waiver in the case.

Mr. Davis: Because we have stated, and the pre-trial order states, the defendant's contentions and states there are no facts or issues in the case upon which a waiver or estoppel can be based.

The Court: Well, I have said my say and made enough trouble for once. Your instructions, if

the case is submitted, will probably provoke the discussion further along these lines.

Mr. Neuner: Does your Honor wish them tonight?

The Court: The sooner the better. We will see what turn things take here when we come back.

(Thereupon Court took a recess at 3:48 o'clock P.M. [88] until 4:00 o'clock P.M., at which time Court reconvened and, the jury being present, the following further proceedings were had herein:)

Mr. Neuner: Mrs. Miller, will you take the stand.

RETA D. MILLER

resumed the stand as a witness in behalf of the plaintiffs and the following occurred:

Mr. Neuner: You may cross examine.

Mr. Davis: The defendant has no cross examination.

Mr. Neuner: That is all, Mrs. Miller.

(Witness excused.)

Mr. Neuner: We rest.

Mr. Huntington: The defendant will call Mr. Howell.

DEFENDANT'S EVIDENCE

F. C. HOWELL

was produced as a witness in behalf of the defendant and, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Huntington:

Q. You are Mr. Frank C. Howell?

A. That is right.

Q. And you reside at Portland? A. Yes.

Q. And what is your profession? [89]

A. Lawyer.

Q. How long have you practiced law?

A. Thirty years or a little more.

Q. And how long in Oregon?

A. That length of time. I have practiced exclusively in Oregon.

Q. You are admitted to practice in the Oregon Supreme Court and lesser courts of the state, and the Federal Court of Oregon? A. Yes.

Q. And other federal courts, the Circuit Court of Appeals for this Circuit?

A. That is right.

Q. In your experience in the practice of law have you handled cases involving claims on insurance policies, claims of various kinds?

A. Yes.

Q. Both for the claimant and also for the defendant? A. Yes.

Q. At different times. I am going to tell you

(Testimony of F. C. Howell.)

certain facts that you may assume for the purpose of this question are true, and based on those facts I will then ask you what you think is a reasonable attorneys' fee in such a case as I describe. You may assume that the facts are as I state them. This case involves claims on two policies of life insurance issued by a life insurance company on the life of an individual, one for a face amount of \$3,000, with a double indemnity provision for an additional [90] \$3,000 in the event of death by accidental means, and also a family income provision for payment of \$30 a month from the time of submission of proof of death, which you may assume as in December, 1940, down to July 17, 1954; that policy provides that those income payments of \$30 a month will be paid monthly over that period; at the end of the period the face amount, \$3,000 will be paid and the double indemnity feature of \$3,000 would be paid immediately upon receipt of due proof of death, if the policy, of course, were in force at the time. The other is a similar policy but the amount is \$2,000 face, has the same double indemnity provision and the family income provision of \$20 a month, and you may assume from the same time but up to July 18, 1959. The action is in this Court, as you understand, and it involves two causes of action, one on either policy. The issues are with respect to whether or not the policies were in force at the time of death, on December 3, 1940. The con-

(Testimony of F. C. Howell.)

tention is made that certain premiums had been paid prior to that time so as to have the policies in force, and the defendant Insurance Company is claiming that certain premiums had not been paid and that both policies had lapsed prior to the time of death and had not been reinstated. There was the complaint, an amended complaint, and then the defendant filed an answer; the case went to pre-trial, involving two pre-trial conferences of approximately one-half day each; certain questions were briefed extensively; the case then is in court for [91] trial, you may assume consuming not more than two days' time for trial in court. Now assuming those facts to be true, what in your opinion—excuse me; there is one other thing I should say, that the issues with respect to the two policies are identical; in other words, under the facts if the plaintiffs should prevail on the first cause of action then plaintiffs would also prevail on the second cause. There is no difference in the facts involved in the two policies. Now with those matters in mind, assuming them to be true, what would you say would be a reasonable attorneys' fee for the attorneys for plaintiffs in handling that case?

A. In the larger policy the monthly payment was \$30 a month?

Q. That is right.

The Court: The gross of the two of them it has been stated is eighteen to twenty thousand dollars.

(Testimony of F. C. Howell.)

Mr. Huntington: Yes. You may assume that the gross amount, without computing present values of those monthly payments, the gross amount of eighteen thousand to twenty thousand dollars is involved in the two cases, the two causes.

A. I should say \$1500 would be a reasonable attorneys' fee, in my opinion.

Q. And how would you divide that between the two causes, if it became necessary?

A. Proportionately as one bears to the other.

Q. Proportioned to the amounts involved? [92]

A. Yes.

Mr. Huntington: You may take the witness.

Cross Examination

By Mr. Neuner:

Q. You are a member of the firm of Wilbur, Beckett & Howell?

A. Yes; and Oppenheimer.

Q. Your firm represents several insurance companies, casualty companies?

A. Quite a number.

Mr. Neuner: Yes. That is all.

(Witness excused.)

Mr. Davis: Defendant rests.

Mr. Neuner: We rest.

The Court: Gentlemen of the jury, I think you need a little holiday. I don't think you need to stay the rest of the day, but I would like for

you to come back at half past nine in the morning.
You may retire.

(The jury here retired and the following proceedings were had without the presence of the jury:)

Mr. Davis: If the Court please, the defendant now moves the Court for an order directing the jury to return a verdict in favor of defendant on plaintiffs' first cause of action, and also on plaintiffs' second cause of action, on the grounds and for the following reasons: [93]

There is no evidence that the premiums due on October 17, 1940, on the policies of insurance involved in plaintiffs' two causes of action were paid when due, or during the grace period, or at all. There is no evidence of any agreement binding upon the defendant that it would accept, or that it did accept, the check dated November 17, 1940, payable to the order of defendant, as absolute or unconditional payment of the premiums due October 17, 1940, on said policies of insurance. There is no evidence of a waiver of the provisions of the policies of insurance involved in plaintiffs' causes of action with respect to the payment of these premiums. There is no evidence that the time of the payment of the premiums due on said policies on October 17, 1940, was extended beyond the grace period or at all.

I presume that the Court would like to hear argument.

The Court: Yes.

(After argument, pro and con, the Court ruled as follows:)

The Court: I will deny the motion for directed verdict and allow the defendant an exception, and I will instruct the jury. I will advise the attorneys before submission, in general how I am going to instruct them. I will instruct them along the lines, as to plaintiffs' theory, of the statement I just made, that the method of payment provided in the policy, also referred to in the premium receipts, it is claimed by the plaintiffs, who [94] have the burden of proof, was departed from in this case by giving an acceptance of this check in payment, and I may use the expression "waiver"—waiver of the kind of payment in the policy normally called for, namely, in cash. I will say nothing about waiver of forfeiture. It seems to me the only reference, in submitting the plaintiffs' theory, to forfeiture would be that if they found, as plaintiffs claim, that check was accepted in payment, if they find the payment in cash was waived, which is the same thing, then they would have no right to forfeit the policy, even though the check was not paid, which turned out to be the fact. And, of course, I will tell the jury that the defendant disputes vehemently that there was an acceptance of the check, either a giving or acceptance of the check in payment, or that there was a waiver by the defendant of the normal requirement of payment in cash. I think I will be pretty brief about it. You have got a point in here, Mr. Davis, that

has not been discussed very much, that this Oregon office here had no authority to vary the terms of the policy as to the manner of payment. You claim that, don't you?

Mr. Davis: Yes.

Mr. Huntington: That is expressly provided in the policy. Neither the soliciting agent, nor the cashier, has any authority to vary the provisions of the policy, to waive any rights or requirements. And, furthermore, there is this matter, too: [95] The premium is only payable in exchange for the official premium receipt.

The Court: Let me make what I understand to be your position as to that a little clearer. You claim there is nobody here in this Oregon office—I say Oregon office; the testimony was that this office looks after the Oregon business of the company—there is nobody in this Oregon office who would have authority to agree expressly with this policyholder or any other policyholder to take his check or note in payment, don't you?

Mr. Davis: As unconditional payment.

The Court: Well, as claimed here?

Mr. Davis: As claimed here, yes.

The Court: Yes.

Mr. Huntington: That is not true in respect to a note for the first premium.

The Court: I understand the distinction. Now you have never had much to say about that on the other side. You don't have facts in this case like in the John Hancock case.

Mr. George Wm. Neuner: No. They had a general agency.

The Court: And where they show what the transaction was with the home office.

Mr. George Wm. Neuner: That is correct, your Honor. I might state that the cases make this distinction: That although those particular terms or conditions are in the policies themselves, still that does not govern the agency that may exist between [96] the insurance company itself and any of its particular agents. In other words, that an agency is determined by other facts and circumstances and the policy does not control that agency. Now, in this case Mr. Durham testified that his work was to collect premiums and that he had possession of and was responsible for the premium receipts. He had authority to endorse New York Life checks and to deposit those to the New York Life's account. In *Republic Life v. Hatcher*, cited in our brief, 51 S. W. (2d) 922, the court said: "The agent had authority to collect the premium, and the acceptance of a postdated check therefor was within the apparent scope of the agency." That point was specifically raised in that case.

The Court: Well, I am interested in two things about this. One is, Mr. Huntington and Mr. Davis claim straight out as a matter of limitation on Mr. Durham's authority, with notice to the policyholder in the policy, Mr. Durham would have no authority to do expressly anything here to bind the company, which you claim he did impliedly. Secondly,

if I should not feel that strongly about it, is there a question of fact here to be submitted to the jury as to his authority? You have offered no instruction on that. In other words, can a general agency in Oregon of this company, or any other company, in matters of this kind, vary the terms of the policy in the manner of payment? We have the statute that you are all familiar with and you cite it here, which I don't think applies—we have dealt [97] with it in other cases, Judge Fee and I—that the soliciting agent can bind the company as to all matters connected with the origination of business. We have had that statute in several cases. Here you have a question having to do with a policy long after it was solicited and written.

Mr. Neuner: Yes, that is true. The statute provides the application of the policy and the policy issued in consequence thereof.

The Court: Well, all I can say is that I hope you find some comfort in that statute in this case, but I don't think it applies, and, in candor, if I submit the case, as I am inclined to do as to that agency question, I won't be relying in my own mind on the statute.

Mr. Neuner: I debated a long time whether I should put it in or not before I read the case that I think your Honor refers to here that went up to the Circuit Court of Appeals.

The Court: Yes. There is the United States Supreme Court late case.

Mr. Neuner: Stipech.

The Court: Yes; and we had a case here from Southern Oregon dealing with it, and Judge Fee had occasion to deal with it in Cole v. Northwestern Life Insurance Company.

Mr. Neuner: I appreciate that was a little different. That was the question of information or insurability of the applicant.

The Court: That had to do with solicitation or the original [98] application, taking the application.

Mr. Neuner: Yes.

The Court: Here is some insurance that was more than a year old, about a year old or longer.

Mr. Neuner: But we take it in this case, of course, that the branch office of the company was in Portland, the receipts were in its possession, they had the collection of the premiums, they had the right to endorse, and, coupled with that, they licensed their agents. Now Yount testified that over all these years he was very intimate with this man, was his adviser; and, coupled with the fact that he dealt with the office itself, why, I can't for the life of me see where there could be any question about the agency. And, furthermore, if they accepted, if he accepted that, they again waived the provisions of the policies, and those provisions having to do with that particular thing, that no one is authorized to vary the terms thereof.

The Court: Except the designated—

Mr. Neuner: Except the vice president, the president, vice president, the secretary and treasurer, I believe.

The Court: Well, there is something in there that you can rely on that slipped your mind for a minute; it had mine. There is something in that language, Mr. Davis, about the manner of payment, which says "except by one who has in his possession the premium receipt". What is that?

Mr. Davis: It says, "No person has any authority to collect [99] a premium unless he then holds said official premium receipt." That is right after "All premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized Cashier of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt." Is that the wording you referred to?

The Court: Well, I guess so.

Mr. Davis: It says further, in that same paragraph, "The premium may be made payable annually, semi-annually or quarterly in advance at the Company's respective rates for such modes of payment and, except as may be otherwise herein provided, the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain this policy in force beyond the date when the next payment becomes due, except as to the benefits pro-

vided for herein after default in premium payment." Now the mode of payment they are attempting to change.

The Court: I wouldn't think it meant mode of payment right there; I think it meant quarterly, semi-annually, and so on.

Mr. Neuner: Yes, that is what it referred to.

The Court: There must be some law some place that you plaintiffs have forgotten about, that a general agent of a life in- [100] surance company in a state of a million people has more authority on this subject than Mr. Huntington and Mr. Davis are willing to concede at the moment. I would think that Mr. Durham could take a promissory note and grant a couple of days beyond the grace period.

Mr. Davis: No.

The Court: Mr. Davis says no.

Mr. Davis: We would not agree to that. No, sir.

The Court: Now to be serious again, you are completely at odds about that. Mr. Davis says it is a matter of law that he can't on the facts we have before us here and you, on the other side, say as a matter of law that he can on the facts we have before us. Mr. Davis says there is no question to put to the jury, either on this or anything else to the case, and you say there is no question to go to the jury on this.

Mr. Neuner: On what?

The Court: On the agency, on his authority.

Mr. Neuner: Well, I don't think so.

The Court: Well, that is what you have said so far.

Mr. Neuner: That wasn't raised by the motion for a directed verdict anyway.

The Court: You can count on it being raised.

Mr. Davis: Well, when we say there is no evidence to submit to the jury, that covers the matter.

Mr. Neuner: Oh, yes, that covers the features of agency. [101]

The Court: Better not treat it too lightly, Messrs. Neuner. Well, we will meet again at nine thirty.

Mr. Neuner: 93 Ore. 473, covers that question of agency in the case of *Hinkson v. Kansas City Life Insurance Company*. I haven't the instructions but they were very voluminous, and it deals with the matter.

The Court: Well, I will ask you both to be prepared to argue the case in the morning at nine thirty.

(Thereupon, at 5:27 o'clock P. M., Court was adjourned until tomorrow, Wednesday, January 21, 1942, 9:30 o'clock A. M., at which time Court convened pursuant to adjournment and arguments were made to the jury in behalf of the respective parties, after which the Court charged the jury as follows:)

CHARGE OF THE COURT

The Court: I don't believe, gentlemen, it will take us long to wind this case up, so, unless you have some objection, we will stay and do it now.

The controlling question, I am sure you understand—you are veterans in jury service now—the

controlling question in this case is whether the check was given and accepted as payment of the premium that came due on October 17th, although the grace period had not yet expired.

Now just a word about that. Ordinarily a check is [102] given and accepted in business transactions conditional on its being paid; it is not payment as such; but in this case I submit to you as a question for your determination, under the facts of this case, the check being dated a few days later than it was written, and under all the other facts in the case, whether there was a different intention on the part of both parties in this case, and in view of your own business transactions where, as I say, a check is given and taken conditional on payment when it is presented. The plaintiff has the burden of proof as to that question. She must satisfy you, by a preponderance of the evidence, to be entitled to your verdict, which means a greater weight of the evidence, that the check was given and accepted as payment of the premium, to be entitled to your verdict; and unless you are so satisfied by a preponderance of the evidence as to the intention of the parties—that means both parties—then your verdict must be for the defendant.

Now just to state it again, Did Miller intend that the check was being given by him as payment? By that, from his point of view, meaning simply this: That whereas up to that time he had no obligation to pay the insurance premium—I think you understand that clearly; I will mention it again; the

lawyers have mentioned it on both sides—in the ordinary insurance transaction, and that is true of this one, there is no obligation to pay the premium. You may pay the premium, and if you [103] do you keep the policy in force; if you don't pay the premium the policy lapses.

Now the question is in this case, Did Miller intend to bind himself, and did he bind himself, to pay the premium? Was his intention in giving that check, so far as his part of it was concerned, that it should be obligatory upon him and be enforceable against him so that when he executed the check he had in mind that he had committed and obligated himself to pay the premium by giving that check?

But that would not be enough to entitle the plaintiff to recover. You must consider also the defendant's point of view. There must be a meeting of the minds, as Mr. Davis said, before the plaintiff would be entitled to recover. Did the defendant treat the transaction the same way? Under all the circumstances of the case, did they treat this check differently than the ordinary check, which, as I say, is given and taken conditional on its payment? When they laid the check aside, as apparently they did for a few days, and thereafter put it through for deposit on the next business day after its due date, was it the intention of the defendant in thus dealing with the check treat that as payment; by that I mean to treat that as a binding obligation given to them by Miller, which they could enforce in the way that all obligations are

enforced? If both the giver of the check intended it to be as payment and intended to create a binding obligation on him, and if the receiver of the check, the defendant, treated the transaction the same way, that the [104] check was a binding obligation and could be enforced, and there was a meeting of the minds on that, then that would be payment by the check and that would entitle the plaintiffs to recover in this case, should you so find from a preponderance of the evidence.

Now as I say, that is the controlling question in the case.

I am going to say a few things especially, particularly about the defendant's position in the case. I just want to add one thing more, though, before I leave that summary that I made in opening as to the controlling issue.

The defendant claims that Mr. Durham, the cashier, had no authority to accept the check as payment, and I instruct you, gentlemen, that you must find as to that also before the plaintiff is entitled to recover; you must find as to whether Mr. Durham did have authority.

If you find from all you have heard here that Mr. Durham had authority to bind the company by accepting the check as payment, then the plaintiff would be entitled to your verdict, if the defendant, acting through him, did, in fact, accept it as payment. But should you not find as to any one of those two things, the plaintiffs would not be entitled to recover. Did Mr. Durham have au-

thority to bind the company, to accept the check as payment? Did he, in fact, acting for the company, treat the check as a binding obligation and accept it for the company as payment? I submit both of those questions [105] to you as questions of fact.

Now dealing especially with some phases of the defendant's position, you have a number of exhibits in the case here. We boil these trials down a lot by our pre-trial procedure. We think that is the modern way of doing things, and it reduces the time of jury service that we must ask of you and other citizens. But I would not want, in this case or in any case, any party to be prejudiced by the fact that his case did come in rather briefly. I would not want the impression to be created that that was because there wasn't much to his case. There has been a good deal of time spent in this case, and in others, preliminarily in the presentation of the theories of the parties and in identifying and getting in evidence the written evidence. You will find a good many exhibits in this case, when you get to the jury room, that have been offered by the defendant as well as by the plaintiffs, and the fact that nothing has been said about them here to speak of does not take away at all their weight or value as you may find.

Now in the policies—the policies, I take it, as to the body of them, are the same—in the policies and in the premium receipt are certain clauses on which the defendant especially relies in the as-

sertion of its two main positions, that this check was not accepted in payment, and that the cashier here did not have authority to bind the company to accept it as payment; and I will ask you to examine all the [106] exhibits closely, and particularly to examine the policies and the premium receipt for these clauses that I will now call to your attention; not that I am seeking to make any expression as to facts in the case. You are the sole exclusive judges of the credibility of the witnesses, and the weight and value of the testimony, and if I appear to make any expression here on the facts as if I were indicating to you any opinion of my own on the factual situation, please disregard it. My intention and all I am trying to do is to make an explanatory statement to you that will be helpful to you as the sole and exclusive triers of the facts.

Now from a memorandum defendant has handed me I read a portion of the policy, which is the contract:

“This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract.”

I am skipping a little because I just don't think it applies to what I am discussing.

“No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the company's rights or requirements.”

And I am skipping a little more for the same reason. Now I am quoting from a clause in the policy that has been called to my attention by the defendant's attorneys.

"Payment of Premiums.—All premiums after the first [107] are payable on or before their due date at the Home Office of the Company or to a duly authorized Cashier of the Company, but only in exchange for the Company's official premium receipt signed by the President, a Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt."

And I am dropping a little out that does not seem to me to apply; and now, reading further:

Title "Grace.—If any premium is not paid on or before the day it falls due the policy-holder is in default; but a grace of thirty-one days will be allowed for the payment of every premium after the first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be charged as an indebtedness against this Policy."

In this case it happened that the thirty-first day, the last day of grace, came on Sunday. That was the date that was on Mr. Miller's check. It is my

opinion, for whatever bearing it has in the case, and I instruct you that, as a matter of law, that grace period was extended until the next day. That was the day the company deposited the check in the bank, the next business day. It is my view of the law that this premium was payable up to and including the thirty-second day, because the thirty-first day came on a non-business day—on a non- [108] secular day.

Now there is one other portion of the documents in the case that the defendant has called to my particular attention and I call to your particular attention, for such consideration as you feel it is entitled to, along with all the other evidence in the case. That is the language in the premium receipt which was mailed out, as you remember, on the 18th, the day when Mr. Miller's check was deposited. The language is, "If remittance otherwise than in cash has been made, this receipt shall be void if payment of such remittance is not actually received by the company."

The defendant's position in the case is that it accepted this check, as I said before, with considerable elaboration, the same as any other check, subject to its payment in cash when it was presented; and, as I said before, should you not be convinced to the contrary the defendant would be entitled to your verdict.

There is no need for me to say to you men, skilled and experienced here in work as jurors—I know there isn't; I know you too well for that—that you

are not to be controlled by any sympathy, passion or prejudice in this case. Treat this case simply on the evidence presented here and, under the instructions that I have given to you, decide the case dispassionately. I ask you to do that, and I know you will.

Just one or two little passing things. As to the [109] part that Yount played, who picked up the check out at Mr. Miller's place, I instruct you, gentlemen, that what he did could not bind the company. He served, as I view it, as the intermediary whereby Mr. Miller's check was brought to the company. Only what the company did with the check after it came to the Cashier's office could bind the company, and only then, if you find that, as I said to you before, Mr. Durham had authority to bind the company as to the issue here in question.

Now as to this money order which Mrs. Miller mailed after she found in the mail—you recall the dates, I am pretty sure; due to the holidays and for other reasons the mail seemed pretty slow in getting back and forth; it always has to me; no blame attaches to anybody, nor is there any particular significance to it, but that is one of the facts in this case that struck me from the beginning, how slow the mails were going back and forth between Portland and McMinnville. The fact was, I remember it, that on the 18th the company deposited Mr. Miller's check here and mailed to him the premium receipts. That was on Monday, and that got out to McMinnville on a Wednesday, as I remember

it; the check was turned down and came back to Portland, and the bank here where it had been deposited notified Mr. Durham's office on the next Monday. An even week elapsed between the time the check was deposited here and Mr. Durham's office was notified that the check had been dishonored. Then, as I remember it, on the next day Mr. Durham's office wrote [110] a letter to Mr. Miller, advising him that the check had been dishonored and asking him to execute this personal health certificate that has been referred to. Mr. Miller never got that letter; he had been injured in the meanwhile and was in the hospital; but Mrs. Miller got it and right away, so she testified—all these things that were testified to are for you to accept or reject, as you view the testimony, but she testified, as I remember it, that right away, as soon as she learned what had happened to this check, she got the money, including the interest charge that had been added, and put it in the form of this money order and mailed it in to the office. Now as to that payment by her, gentlemen of the jury, that is just one of the later circumstances in this case. That does not bear on the controlling questions in the case. What they did with that money order, the fact that she sent in that money order, what the company did with the money order, does not bear on the controlling question in the case. As I say, it is just one of the later circumstances, just as we provide you with information as to some of the preliminary circum-

stances in the case. The controlling circumstances in the case run from the time Mr. Miller gave the check to Yount, who took it on in, and what the company did with it thereafter, not what occurred after the check was dishonored.

Statements made in argument by the attorneys are not evidence. Such statements, arguments, comments, or suggestions, [111] are not evidence and must not be considered by you as such, and they must not be considered for any purpose.

Any evidence offered and rejected, or which has been stricken out by the Court, such evidence is to be considered by you as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced and inferences which you may draw therefrom, and upon the law as given you in these instructions.

Your verdict must be unanimous. You will elect a foreman when you retire, who will return your verdict for you.

The question of attorneys' fees is in the case. I have here two forms of verdict. You will sign one or the other, and you will agree which it is you will sign. If your verdict should be for the defendant, if that is your verdict, it is in the usual form. The verdict for the plaintiff is a little different than the usual form. Should your verdict be for the plaintiff it reads, "We, the jury duly empaneled in this action, find in favor of the plaintiffs and assess the sum of blank dollars as attorneys' fees in this action."

Now you notice, should that be your verdict, that you don't find any particular amount for the plaintiffs. That is because of certain calculations which will have to be made by us in the preparation of the judgment. But this permits you, should you find that the premium was paid and Mr. Durham had the authority that I have spoken about to bind the company, [112] should that be your verdict for the plaintiff, this permits you to find liability against the defendant and in favor of the plaintiff and it leaves only the question of attorneys' fees, the only question in dollars you will return. You have heard the evidence as to that. You are the sole and exclusive judges of what amount should be found for that. Should your verdict be for the plaintiff you should fill that amount in, should that be your verdict.

Now will you gentlemen please come with me for a few minutes; and we won't detain you much longer, if you will just remain in your seats.

(The Court, counsel, court reporter and the clerk here retired to the Judge's chambers and, without the presence of the jury, the following occurred:)

The Court: Will the plaintiff state its objections and exceptions to the charge, please.

Mr. George Wm. Neuner: We except, first, to the Court's ruling to the effect that the usual giving of a check is only conditional payment, in that no distinguishing statement was made as to whether there was a pre-existing or contemporaneous liability, or whether there was no pre-existing liability.

Also except to the Court's instruction that the grace period in this case extended to the next business day where the last day of grace, the last of the thirty-one-day period, fell on a Sunday. [113]

Also except to the Court's instruction to the effect that what the agent Yount did does not bind the company, and particularly that if the company by taking the check or otherwise ratified those acts, what Yount may have done would then bind the Company.

Also except—and I take it generally—except to the Court's failure to give Plaintiffs' Requested Instructions numbered 1, 2, 3 and 4; and particularly 3 and the general subject matter of a postdated check.

The Court: George, senior?

Mr. George Neuner: I think that covers it, except we would like to except to the—

Mr. George Wm. Neuner: We also except to the failure of the Court to instruct that slight evidence would suffice to show the acceptance of the check as payment, wherein there is a forfeiture involved, on the ground that courts abhor a forfeiture of a life insurance policy.

The Court: Objections and exceptions of the plaintiff are respectfully overruled. Now will the defendant state its objections and exceptions. While our rules don't use the word "exceptions" any more—they use the word "objections"—I am considering "exception" wherever used here by the lawyers—sometimes they fall into the old parlance—as meaning objections under our rules.

Mr. Huntington: If the Court please, the defendant objects [114] to the following instructions which were given by the Court:

The instruction with respect to submitting to the jury the question of Mr. Durham's authority as agent. Our objection there goes to this point: That the evidence is uncontradicted as to the authority of Mr. Durham; it is a matter of law and not a matter of fact or an issue to be submitted to the jury.

The Court: And there, Mr. Huntington, as we developed yesterday, you claim as a matter of law that he did not have such authority?

Mr. Huntington: That is true, your Honor. We think the record shows that all the way through, both from the agreements in the policy and particularly with respect to his lack of authority to waive any requirements or rights, and his lack of authority, or the authority of anyone, to collect the premium, or agree to the payment of a premium, except in exchange for the company's official premium receipt.

The defendant objects to the instructions with respect to submitting to the jury the issue as to whether or not there was an agreement between the insured and the company to accept the check as payment.

One reason for this objection is that the agents who acted in this regard were not authorized to make any agreement or to accept the check as unconditional payment. We think, furthermore, that the instructions referred to the payment. [115] They omitted the unconditional feature of the payment.

They omitted to state, in connection with submitting this issue, that a check may be taken as conditional payment and in that event payment is not finally made unless the remittance is paid.

Now the Court gave, in a different form, some of the instructions we asked for, particularly instructions from 3, and Defendant's Requested Instructions 3, 4, 5, 6, 7, 8 and 9. We think the instructions as requested state the law accurately and should have been given in the form submitted, in order to get before the jury the defendant's theory of the case, if it were to be submitted at all.

Furthermore, we object to the failure of the Court to give the Defendant's Requested Instruction No. 1.

The Court: The defendant's objections and exceptions are respectfully overruled.

(Thereupon the Court, counsel, the court reporter and the clerk returned to the court room and in the presence of the jury the following occurred:)

The Court: Swear the bailiffs.

(The two bailiffs were here sworn.)

The Court: Be sure to date your verdict, gentlemen. You may now retire with the bailiffs, and the clerk will sort out the exhibits and send them up to you right away.

(Thereupon the jury retired in charge of the bailiffs at 12:27 o'clock P. M.) [116]

REQUESTED INSTRUCTIONS

The following written instructions requested in behalf of the defendants were submitted to the Court:

The defendant requests the Court to instruct the jury as follows:

I.

You are hereby instructed to bring in a verdict in this case in favor of defendant.

If the Court refuses to give defendant's requested instruction No. 1, then the defendant requests the Court to instruct the jury as follows:

II.

This case involves two causes of action commenced by plaintiffs against the defendant to recover certain sums of money alleged to be due the plaintiffs or to become due the plaintiffs by reason of two policies of insurance on the life of Warren L. Miller, and in which the plaintiffs were named as beneficiaries.

In these policies of insurance the defendant agreed to pay the plaintiffs as beneficiaries certain sums of money at the time mentioned in the policies. The amounts to be paid under the policies are not in dispute if it should be found that the policies were in force at the time of the death of said Warren L. Miller. [117]

The policies contained provisions to the effect that they were issued in consideration of the payment of the premiums provided in said policies. Under the terms of these policies a premium became due on each of the policies on October 17, 1940.

Each of the policies contained a provision to the

effect that if any premium is not paid on or before the day it falls due the policyholder is in default, but a grace of thirty-one days will be allowed for the payment of each premium after the first, during which time the insurance continues in force.

Plaintiffs have alleged and the defendant has admitted that the insured died on the 3rd day of December, 1940. The plaintiffs have also alleged that the policies were in full force and effect on the 3rd day of December, 1940. The defendant has denied that the policies were in full force and effect on the 3rd day of December, 1940, and alleges that the quarterly-annual premiums due on said policies on October 17, 1940, were not paid, and by reason thereof the policies lapsed for non-payment of premiums prior to the 3rd day of December, 1940, and were not in force on said date.

You are instructed that the burden of proving that said policies were in force on December 3, 1940, rests upon the plaintiffs and they must prove by a preponderance of the evidence that the premiums due on said policies on October 17, [118] 1940, were paid when due or within the period of grace allowed by the policies.

III.

You are instructed with respect to the time within which the premiums on said policies might be paid that the 31st day after the due date of the premiums due on October 17, 1940, fell on a Sunday, and therefore the insured had all of the next day or all of Monday, the 18th day of November, 1940, within which to pay the premiums due on October 17, 1940.

IV.

The premiums due on said policies were payable in cash at the Home Office of the Company or to a duly authorized cashier of the company, but only in exchange for the company's official premium receipt signed by certain officers of the company and counter-signed by the person receiving the premiums. No person had any authority to collect a premium unless he then held the official premium receipt.

V.

The evidence in this case shows that on November 13, 1940, the insured gave to A. E. Yount, a soliciting agent of the defendant, a check payable to the order of the defendant in the amount of premiums due on said policies on October 17, 1940. This check was dated November 17, 1940. There is no evidence that Mr. Yount had the official premium receipts for said policies. You are, therefore, instructed that Mr. Yount had no authority to collect the premiums due on said policies [119] and the giving of the check to Mr. Yount did not constitute payment of the premiums.

VI

Under the terms of the policies no agent is authorized to make or modify the policies or to extend the time for the payment of premiums, or to waive any lapse or forfeiture or any of the company's rights or requirements.

VII.

The plaintiff claims that the check, dated November 17, 1940, and given to Mr. A. E. Yount on November 13, 1940, and subsequently delivered to the cashier's office of the Oregon Branch Office, was accepted by the defendant company as payment of the premiums due on October 17, 1940.

You are instructed that ordinarily a check is not unconditional payment, but such payment is conditioned upon the check being honored when presented for payment, and in the absence of an agreement between the insured and the defendant to accept said check as unconditional payment the check does not constitute payment unless honored when presented for payment.

In this connection you are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that there was such an agreement between the insured and the defendant made by a person having authority to make such an agreement. [120]

You are further instructed that if such an agreement was made by an unauthorized agent, then before such agreement could be binding upon the defendant the agreement must be ratified by a person having authority to do so, and the burden of proof is upon the plaintiffs to show such ratification by a preponderance of the evidence.

VIII.

The evidence shows that the cashier of the Oregon Branch Office of defendant on November 18, 1940,

mailed to the insured the official premium receipts covering the premiums due on the policies on October 17, 1940. These receipts contained the following condition:

“If remittance otherwise than in cash has been made, this receipt shall be void if payment of such remittance is not actually received by the Company.”

The evidence further shows that the check dated November 17, 1940, for \$48.72 was dishonored by the bank on which the check was drawn because the drawer of the check did not have sufficient funds on deposit in the bank to cover the check.

The mailing of the official premium receipts is not evidence that the company accepted the check as unconditional payment of the premiums, and in view of the evidence that the check was not honored when presented for payment the premium receipts could not be considered as evidence showing payment of the premiums due October 17, 1940. [121]

IX.

The evidence shows that upon receipt of a letter from the cashier of the Oregon Branch Office of the defendant returning the dishonored check to the insured, the plaintiff, Reta D. Miller, mailed a post-office money order to the defendant on November 28, 1940. You are instructed that the mailing of this postoffice money order did not constitute payment of the premiums due on the policies and had no effect whatsoever upon the issues of this case.

X.

You should not be controlled in this case by any feelings of sympathy which you might have, but should be governed in your deliberations solely by the evidence in the case and the instructions of the Court without any prejudice or sympathy of any kind whatsoever.

XI.

You are further instructed that in determining any of the questions of facts presented in this case you have no right to indulge in conjecture or speculations not supported by the evidence, and I charge you it is your duty to find and determine the facts of this case from the evidence, and having done so, then to apply to such facts the law as stated in the instructions given you by the Court. [122]

XII.

Statements made in argument by attorneys in the case are not in evidence. Such statements, arguments, comments, or suggestions are not in evidence and must not be considered by you as such. You must not consider for any purpose any evidence offered and rejected or which has been stricken out by the Court. Such evidence is to be considered by you as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and inferences which you may deduce therefrom and such presumptions as the law may deduce therefrom as stated by the Court to you in these instructions, and upon the law as given you in these instructions. [123]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Alva W. Person, hereby certify that I reported in shorthand all of the oral proceedings had, including all the evidence given, objections and rulings thereon and exceptions taken thereto, the charge of the Court to the jury and objections and exceptions taken thereto, upon the trial of the above entitled cause in the above entitled Court on January 20 and 21, 1942, before the Honorable Claude McColloch, and a jury; that I thereafter prepared a typewritten transcript from my shorthand notes so taken and the foregoing and hereto attached 123 pages of type-written matter, numbered 1 to 123, both inclusive, contains a full, true and correct record of all the evidence given, all objections, rulings thereon and exceptions taken, the charge of the Court to the jury and objections and exceptions thereto, the instructions requested by the defendant in writing, and relevant [124] portions of the discussion and argument before the Court.

In Witness Whereof I have hereunto set my hand at Portland, Oregon, this 22nd day of June, 1942.

ALVA W. PERSON
Court Reporter.

[Endorsed]: Filed Jul. 27, 1942 [125]

[Endorsed]: No. 10258. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a corporation, Appellant, vs. Reta D. Miller and Warren D. Miller, Marcia M. Miller, minors, by Reta D. Miller, Guardian, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed September 21, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10258

RETA D. MILLER, Warren D. Miller and Marcia
M. Miller, Minors, by Reta D. Miller, Guardian,

Plaintiffs-

Respondents,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a foreign corporation,

Defendant-
Appellant.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD

Pursuant to Rule 19 (6) of the United States Circuit Court of Appeals for the Ninth Circuit, Appel-

lant, New York Life Insurance Company, a corporation, herewith furnishes a concise statement of the points on which it intends to rely on appeal, as follows:

1. The court erred in its refusal to direct a verdict in favor of defendant on each of plaintiffs' causes of action for the reason that there was no evidence that the premiums due October 17, 1940, on the policies of insurance involved herein had been paid when due or within the grace period, or that there had been any waiver of the provisions of the policies with respect to the payment of the premiums. Consequently, the policies lapsed for non-payment of the premiums and had no value whatsoever on the date of the death of the insured.
2. The court erred in receiving into evidence plaintiffs' Exhibit 6, 8-a and 8-c and admitting testimony relative to said exhibits and to matters occurring subsequent to the time defendant returned to the insured the check which he had tendered in payment of the premiums in question. Anything that occurred subsequent to the return of the check has no bearing upon the question of whether the premiums in question had been paid. The exhibits and the testimony referred to are irrelevant and immaterial to the issues involved in this case and their admission was prejudicial to the defendant.
3. The court erred in permitting the witness A. E. Yount to testify to conversations with the insured. A. E. Yount was a soliciting agent of the defendant

and had no authority to bind the defendant on any matters connected with the premiums in question.

4. The court erred in submitting to the jury the question of Mr. R. A. Durham's authority to accept a check as payment of the premiums in question, and erred in instructing the jury relative to his authority and his acceptance of the check. There is no evidence of any kind from which it could be inferred that Mr. Durham had authority to accept the check in question as absolute or unconditional payment of the premiums or to waive any of the company's rights or requirements with respect to the payment of premiums. In instructing the jury as to what constitutes payment the court failed to distinguish between absolute or unconditional payment and conditional payment. Ordinarily a check is given and received as conditional payment, and one claiming otherwise must prove it by clear, satisfactory and competent evidence. In this case there was no such evidence.

5. The defendant in its requested instructions set out its theory of the case and properly stated the law applicable thereto. The court in its instructions to the jury not only failed to give defendant's requested instructions, but in instructing the jury did so in a manner which was confusing and misleading to the jury. The court in instructing the jury did not accurately state the law applicable to the issues involved.

Pursuant to the above mentioned rule the defendant New York Life Insurance Company, a corpora-

tion, hereby designates the parts of the record which it thinks necessary for the consideration of the above mentioned points as follows:

All of said record needs to be considered, except only the following portions of plaintiffs' Exhibit No. 1 need to be considered, to-wit:

All of Page 1 of said exhibit; those paragraphs of said exhibit included under Miscellaneous Benefits and entitled "Grace," "Reinstatement" and "Rights of Insured;" those paragraphs included under Other Provisions and entitled "Payment of Premiums" and "The Contract;" the provisions entitled "Accidental Death Benefit;" and that paragraph of Part I of the application commencing with the words "It is mutually agreed," and ending with the signature "Warren L. Miller."

And only the following portions of plaintiffs' Exhibit No. 2 need to be considered:

All of Page 1 of said exhibit; those paragraphs of said exhibit included under Miscellaneous Benefits and entitled "Grace," "Reinstatement," and "Rights of Insured;" those paragraphs included under Other Provisions and entitled "Payment of Premiums" and "The Contract;" the provisions on Page 6 of said exhibit commencing with the words "This contract is made in consideration of," and ending with the attestation clause on said page, and that paragraph of Part I of the application com-

mencing with the words, "It is mutually agreed," and ending with the signature "Warren L. Miller."

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State of Oregon

County of Multnomah—ss.

I, Roland Davis, hereby certify that I am one of the attorneys for Appellant in the above entitled cause; that on September 21, 1942, I placed a true and correct copy of the foregoing Appellant's Statement of Points and Designation of Record in an envelope addressed to Mr. George Neuner, attorney-at-law, McMinnville, Oregon; that George Neuner is one of the attorneys for Respondent in the above entitled cause; that said envelope was then sealed by me and deposited in the United States mail at Portland, Oregon, with first class postage fully paid thereon.

ROLAND DAVIS

Of Attorneys for Appellant.

In the District Court of the United States for the
District of Oregon

No. 779

RETA D. MILLER, and WARREN D. MILLER,
MARCIA M. MILLER, Minors, by RETA D.
MILLER, Guardian,

Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a foreign corporation,

Defendant.

SUPPLEMENTAL MEMORANDUM

I desire to add the following as supplemental to
my memo in this case of date April 20, 1942.

The questions of waiver, estoppel and ratification
usual in insurance cases were not submitted to the
jury. Only the questions of payment, and the au-
thority of the company's State cashier to accept the
postdated check as payment were submitted.
Waiver, estoppel and ratification were plaintiffs'
contentions. Defendant insisted that it would be
improper to submit these (Trial Transcript pp. 87,
88), and failure to submit them could only be ob-
jected to by plaintiffs, as they did before the jury
retired. (*id.* p. 114). In declining to submit waiver,
estoppel and ratification I adopted defendant's the-
ory that these issues were not in the case on the
facts presented. Another reading the record might

take a different view, or on a re-trial, with more evidence offered, submission of these questions might be justified. The evidence offered on both sides was scant, because, on plaintiffs' part, only the testimony of Yount, defendant's agent, was available respecting the circumstances surrounding the giving of the postdated check, while defendant insisted after the pre-trial and identification of exhibits that there was no fact question to be tried.

That the deceased intended his postdated check to be an enforceable obligation seems beyond question.¹ He was a young man, had much to live for, but in the event of death,—to him, no doubt, a remote contingency—he had the reasons that impel honorable men in similar circumstances to protect the young wife and children who had blessed his life. Did he think of the postdated check, given for the premium on the two policies which had been in force for more than a year, as any less binding than the promissory note which he gave at the same time for the new and additional policy that he was taking out in favor of his boy, who was also one of the beneficiaries under the old policies?

¹Payment of the premium or agreement to bind himself to pay the premium was optional with insured until the last day of grace. Plaintiffs' theory was that insured intended to obligate himself by giving the postdated check, and that defendant by its method of handling the check accepted it as an obligation to pay. By this theory the consideration for the check was, of course, a continuation of the insurance in force for another period of three months.

From the company's point of view Miller was a good insurance prospect, as all industrious young heads of families are. As he acquired greater means, and his family increased in size, he could be sold more insurance. Counsel for the company with commendable frankness defended the case on the basis that the acceptance of the postdated check put the company on the same footing as if it had taken a promissory note. Could the company have taken a four day promissory note, under the circumstances of this case, held it until maturity, then in the event of non-payment, have properly denied liability on the policies?

Certainly, to use Mr. Davis' expression, there were facts from which the jury could find a "meeting of minds"—on the one hand, that the insured intended his check as payment (in this connection it should not be forgotten that insured's check stubs, plaintiffs' Exhibit 6, showed that he had a balance at all times); on the other hand, that the company intended to accept the check in payment. There was ample time to advise Miller before the end of the grace period if there was any company policy against accepting postdated checks. He could have been called on the telephone. Yount, the soliciting agent, who brought the check in, and who had an interest in the proceeds of the check, could have been directed to take the check back in person (McMinnville is but an hour's drive—old speed limit—from Portland), or the check could have been returned before the end of the grace period by mail.

The conclusion seems permissible that Miller's account was considered valuable enough that the company did not want to unsettle it by declining to take a postdated check, that to keep his business the company was willing to take the risk of collection of the check. So the jury's verdict may be read.

THE CASHIER'S AUTHORITY

That the cashier in charge of a branch insurance office in a large State may be fairly said to have had authority, as the jury found he did have, to accept a four day postdated check from an old customer in payment of a premium hardly admits of question, in view of *New York Life Insurance Company v. Rogers*, 9th Circ. (March 16, 1942), F.(2d),*, and like cases. One doing the volume of business done by Mr. Dunbar for the New York Life Insurance Company covering all the collections of the State of Oregon can properly be characterized as the company's General Fiscal Agent for the State. Protection of the insured public requires that this should be the rule.²

*I have been unable to find this opinion in the printed reports.

²On the day Miller's postdated check was deposited, 171 other items were deposited (Defendant's Pre-Trial Exhibit 12), most of the items obviously being premium payments from various parts of the State. The items deposited for the day totalled \$9734.95. Mr. Dunbar, the cashier, testified that half or more of the average daily premium payments received in the office came by mail.

General counsel for the company examining this claim in the East uttered too broad a dictum when he gave as a reason for the rejection of the claim: "a worthless check is not payment of a premium". Checks that later turn out to be slow of collection, particularly postdated checks given and accepted after prior business transactions between the parties, are not always treated as worthless as a matter of law. They at times represent an extension of credit for what seem to be good business reasons at the time, and on lawful consideration. The finding of the jury makes this such a case.

Defendant relies heavily on Philadelphia Life Ins. Co. v. Hayworth, 296 Fed. 339. That case seems to have turned on the strong forfeiture clause in the policy.

Plaintiffs rely on John Hancock Mut. Life Ins. Co. v. Mann, 86 F.(2d) 783. The distinctions made in that case between postdated checks and checks presently dated seem to me to be valid. That there are important distinctions is well settled in the criminal law. The judges sitting in the John Hancock case felt that the postdated check should be treated the same as a promissory note. I was aided in the present case by Mr. Davis' frankness in conceding that there was no distinction (except, of course, that a note usually bears interest),—that the present case was to be tried as a matter of law the same as if Miller had given the company a promissory note due on February 17th, instead of a check bearing that date.

THE INSTRUCTIONS

Defendant contended at the argument for n.o.v. or in the alternative for a new trial that the instructions did not stress "unconditional" payment as distinguished from ordinary payment by check which is conditioned on the payment of the check. As to this, I said to the jury:

"..... the controlling question in this case is whether the check was given and accepted as payment of the premium that came due on October 17th, although the grace period had not yet expired.

"Now just a word about that. Ordinarily a check is given and accepted in business transactions conditional on its being paid; it is not payment as such; but in this case I submit to you as a question for your determination, under the facts of this case, the check being dated a few days later than it was written, and under all the other facts in the case, whether there was a different intention on the part of both parties in this case, and in view of your own business transactions where, as I say, a check is given and taken conditional on payment when it is presented. The plaintiff has the burden of proof as to that question....."

The vehemence of the objections of plaintiffs' attorneys attested by their facial expressions and tone of voice, which only the trial judge hearing and seeing could appreciate, indicated that plain-

tiffs' counsel felt I had instructed strongly against them and too favorably to defendant, on this vital phase of the case, and frankly, my feeling in preparing instructions before convening of court on the closing day of the trial was that this was the kind of case where the fact questions, though narrow, were decisive, and that in the interest of an early settlement of the litigation, having in mind the beneficiaries' needs and at the same time the company's good name, I should instruct, if anything, favorably to defendant, although I could not go the whole length demanded by defendant that it had no liability as a matter of law. That is why I simplified the issue of payment, unfavorably I felt at the time to plaintiffs, submitting the issue only in terms of payment, and did not speak of waiver, ratification and estoppel, terms so usual in life insurance cases, and terms which in the event of a re-trial and possible enlargement of the facts might with propriety be employed in this case.

THE TIME SEQUENCE

(See Addenda)

Fate was unkind to Miller and his beneficiaries. There was no favorable "break" in the unfortunate sequence of events.

If Yount had noticed that the check was post-dated and urged Miller not to wait until the last day of grace to pay his premium, Miller might have given his check dated the 13th rather than the 17th. He had money in the bank to cover it that day.

If the branch office had deposited the postdated check in Portland on Thursday, to be held at the McMinnville Bank until its due date (as was done with the postdated check in *John Hancock Mut. Life Ins. Co. v. Mann*, 86 F.(2d) 783), instead of holding the check for deposit in Portland on its due date, some notice might have gotten to Miller, enabling him to replenish his bank account or to make other arrangements to pay the premium before the end of the grace period.

If it had not taken two days, Monday to Wednesday, for the check to go from Portland to McMinnville,—40 miles,³ and five days, Wednesday to Monday, for the check to be returned from McMinnville to the insurance company's office in Portland, and three days, Monday to Thursday, for the check to be received in the Miller mail at McMinnville, the day Miller was gored by the bull, insured would have had time while living to make the insurance good by paying the premium and furnishing the required personal health certificate.

If the McMinnville banker had been more neighborly, he would have found a way to advise Miller that he did not have sufficient funds on deposit before turning down his check, for what was obviously a life insurance premium.

³The premium receipt containing the restrictive language relied on by defendant could not have been received by insured until the grace period expired, and it probably did not reach him until after his check was turned down at the McMinnville bank.

Dated this 15th day of October, 1942.

CLAUDE McCOLLOCH,
Judge.

ADDENDA—THE TIME SEQUENCE

Wed., Nov. 13

Check given to Yount and delivered by him to branch office.

Sun., Nov. 17

Last day of grace.

Mon., Nov. 18

Check deposited in Portland and premium receipts mailed.

Miller credited with payment of premiums and Yount credited with his share in premiums.

Tues., Nov. 19

Wed., Nov. 20

Check received at McMinnville and payment refused.

Thurs., Nov. 21

Thanksgiving.

Fri., Nov. 22

Check arrived in Portland at U. S. National Bank.

Sat., Nov. 23

Sun., Nov. 24

Mon., Nov. 25

Check returned to branch office.

Tues., Nov. 26

Branch office mailed check to Miller with notice
of lapse of policies and personal health certifi-
cate.

Branch office reversed entries.

Wed., Nov. 27

Branch office letter arrived at McMinnville.
Miller injured.

Thurs., Nov. 28

Mrs. Miller received branch office letter of 26th
and sent money order in amount required for
reinstatement.

Fri., Nov. 29

Money order received at branch office.

Sat., Nov. 30

Sun., Dec. 1

Mon., Dec. 2

Agent Yount saw Mrs. Miller.

Branch office returned money order.

Tues., Dec. 2

Miller died.

Money order received by wife after death of in-
sured.

United States of America,
District of Oregon—ss.

I. G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing copy of Supplemental Memorandum, in cause No. Civil 779, Reta D. Miller, and Warren D. Miller, Marcia M. Miller, Minors, by Reta D. Miller, Guardian, plaintiffs vs. New York Life Insurance Company, a foreign corporation, defendant, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 10th day of November, 1942.

[Seal] G. H. MARSH,
 Clerk.

[Endorsed]: Filed Oct. 15, 1942.

[Endorsed]: No. 10258. United States Circuit Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Appellant, vs. Reta D. Miller and Warren D. Miller, Marcia M. Miller, Minors, by Reta D. Miller, Guardian, Appellees. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed November 16, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

2

In the United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant

vs.

RETA D. MILLER and WARREN D. MILLER,
MARCIA M. MILLER, Minors, by Reta D. Miller,
Guardian,

Appellees

Appellant's Brief

Upon Appeal from the District Court of the United
States for the District of Oregon

HON. CLAUDE McCOLLOCH, Judge

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FILED

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PAUL F. O'BRIEN,
CLERK

In the United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant

vs.

RETA D. MILLER and WARREN D. MILLER,
MARCIA M. MILLER, Minors, by Reta D. Miller,
Guardian,

Appellees

Appellant's Brief

Upon Appeal from the District Court of the United
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HON. CLAUDE McCOLLOCH, Judge

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE
COMPANY, a corporation,

Appellant

vs.

RETA D. MILLER and WARREN
D. MILLER, MARCIA M. MILLER,
Minors, by Reta D. Miller, Guardian,

Appellees

No. 10258

Appellant's Brief

Upon Appeal from the District Court of the United
States for the District of Oregon

HON. CLAUDE McCOLLOCH, Judge

STATEMENT OF JURISDICTION

On September 4, 1941, plaintiffs, citizens of the
State of Oregon, filed in the District Court of the United
States for the District of Oregon their Amended Com-

plaint against the defendant New York Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, seeking to recover death benefits under two policies of insurance, demanding judgment against defendant for \$6,000 with interest at 6% per annum, the further sum of \$30.00 per month beginning as of December 3, 1940, and terminating on the last monthly income date prior to the 18th day of July, 1954, and the further sum of \$1,500 attorneys' fees on their first cause of action, and for \$4,000 with interest at 6% per annum, together with the further sum of \$20.00 per month beginning as of December 3, 1940, and terminating on the last monthly income date prior to the 18th day of July, 1959, and the further sum of \$1,000 attorneys' fees on their second cause of action (Amended Complaint Par. 1 and IV of first cause of action, and Par. I and II of second cause of action, and Prayer. Tr. Pages 3, 4, 8, 9 and 13).

Jurisdiction of the United States District Court is grounded on the Congressional Act of March 3, 1875, as amended (U.S.C.A. Title 28, Sec. 41, Subdivision I). Jurisdiction of this Court is grounded on the Congressional Act of March 3, 1891, as amended (U.S.C.A. Title 28, Sec. 225).

STATEMENT OF CASE

On July 13, 1939, and on February 29, 1940, defendant issued to Warren L. Miller as insured its policies of insurance numbered 17 395 774 and 17 395 775 (Pl. Ex. 1 and 2. Tr. Pages 93-116), wherein it agreed to pay upon receipt of due proof of the death of insured certain payments at various times therein mentioned.

In his application for both policies the insured agreed:

"* * * 2. That the soliciting agent is not authorized to collect any premium for the insurance hereby applied for except the first premium thereon, which in no event shall exceed one annual premium for such insurance, together with the premium for preliminary term insurance, if any, and that a receipt on the form attached as a coupon to this application form is the only receipt the soliciting agent is authorized to give for any payment made hereunder before the delivery of the policy. 3. That only the President, a Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements; that notice to or knowledge of the soliciting agent or the Medical Examiner is not notice to or knowledge of the Company, and that neither of them is authorized to accept risks or to pass upon insurability."

(Pl. Ex. 1 and 2. Tr. Pages 99 and 109.)

Both policies contained the following provisions:

“The Contract.—This Policy and the application therefor, copy of which is attached hereto, constitute the entire contract. * * * * No agent is authorized to make or modify this contract, or to extend the time for the payment of premium, or to waive any lapse or forfeiture or any of the Company’s rights or requirements. * * * *

“Payment of Premiums.—All Premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized Cashier of the Company, but only in exchange for the Company’s official premium receipt signed by the President, a Vice-President, a Secretary or the Treasurer of the Company, and countersigned by the person receiving the premium. No person has any authority to collect a premium unless he then holds said official premium receipt. The premium may be made payable annually, semi-annually or quarterly in advance at the Company’s respective rates for such modes of payment and, except as may be otherwise herein provided, the mode of payment may be changed by agreement in writing and not otherwise. The payment of the premium shall not maintain this Policy in force beyond the date when the next payment becomes due, except as to the benefits provided for herein after default in premium payment.

“Grace.—If any premium is not paid on or before the day it falls due the policyholder is in default; but a grace of thirty-one days will be allowed for the payment of every premium after the

first, during which time the insurance continues in force. If death occurs within the period of grace the overdue premium will be charged as an indebtedness against this Policy.

"Reinstatement.—This Policy may be reinstated at any time within five years after any default, upon presentation at the Home Office of evidence of insurability satisfactory to the Company and payment of overdue premiums with interest at five per cent per annum thereon from their respective due dates. Any indebtedness to the Company at date of default, including interest thereon, must be paid, provided, however, that if it is not in excess of the Cash Surrender Value as at date of reinstatement it may remain as an indebtedness subject to the loan provisions of this policy."

Quarter annual premiums on both policies became due on October 17, 1940. On Wednesday, November 13, 1940, the insured at McMinnville, Oregon, gave to A. E. Yount, a soliciting agent of the defendant, a check payable to the order of the defendant in the amount of these quarter annual premiums. The check was dated November 17, 1940. The latter date fell on Sunday. Mr. Yount did not have the official premium receipts with him (Tr. Pages 148-149).

On the same day that he received the check Mr. Yount returned to Portland, and in the late afternoon turned the check in to the office of defendant's local cashier. On Monday, November 18, 1940, the

cashier made an entry on the Daily Premium and Commission Report (Def. Ex. 21. Tr. Page 200). On the same day he deposited the check in the United States National Bank of Portland (Oregon) (Def. Ex. 12. Tr. Page 185). On the same day he mailed to the insured the official premium receipts covering the premiums in question (Def. Ex. 10 and 11. Tr. Pages 182-183). Each receipt contained on its face the following stipulation:

“If remittance otherwise than in cash has been made this receipt shall be void if payment of such remittance is not actually received by the Company.”

The check, drawn on the First National Bank of McMinnville, Oregon, reached that bank for payment on November 20, 1940. On November 18, 1940, the date of the check, the drawer of the check had a balance on deposit of sixty-seven cents. On November 20, 1940, he had a balance on deposit of \$1.05 (Pl. Ex. 5. Tr. Page 172). Payment was refused by the drawee bank because of not sufficient funds. (Def. Ex. 13 and 14. Tr. Pages 191 and 194.)

Thursday, November 21, 1940, was Thanksgiving Day. The check was returned to the United States National Bank of Portland (Oregon) on Friday, November 22, 1940. On Monday, November 25, 1940, this check with others was returned to the cashier's office

of defendant and the cashier issued defendant's check to the bank to take up this and other checks which had been returned unpaid (Def. Ex. 15. Tr. Page 196).

On the following day, November 26, 1940, the cashier by letter (Pl. Ex. 3. Tr. Page 117) returned the check to the insured advising him that the check was not honored when presented to the bank for payment, and because of that fact the premiums stood unpaid, and that inasmuch as the grace period had expired the policies lapsed and he was requested to return the official premium receipts. He was urged to immediately apply for a reinstatement of the policies by filling in complete and accurate answers on the personal health certificate enclosed. The letter then said: "Please then return the form accompanied by a remittance of \$49.07 (which included interest to November 29, on the past due premiums) to this office in order that if the evidence of insurability is found to be satisfactory to the Company, this policy may be promptly reinstated." On the same day the cashier reversed the entries made on November 18, 1940, on the Daily Premium and Commission Report (Def. Ex. 22. Tr. Page 201).

The letter of November 26, 1940, was received at the McMinnville postoffice on November 27, 1940 (see Pl. Ex. 3a. Tr. Page 122), but apparently was not delivered until November 28, 1940. Unfortunately the

insured was injured on November 27, 1940, and died on December 3, 1940 (Pl. Ex. 7. Tr. Page 177).

On Thursday, November 28, 1940, after receiving defendant's letter of November 26th, Mrs. Miller secured a postoffice money order (Pl. Ex. 8c. Tr. Page 127) for the amount mentioned in the letter and forwarded this money order to the defendant. The personal health certificate mentioned in the letter was not returned to the defendant.

On Monday, December 2, 1940, the cashier returned the money order because he was not furnished with an application for reinstatement as requested in the letter of November 26th (Pl. Ex. 8a. Tr. Page 124).

This action was commenced by the beneficiaries to recover the death benefits provided in the policies. The ultimate question of fact to be determined is whether the policies were in force on the date of death of the insured. This question depends on whether the premiums due October 17, 1940, had been paid. Plaintiffs contended that the check (Pl. Ex. 4) was accepted by the defendant as full payment of the premiums. The defendant contended that the check was accepted conditionally upon the check being honored when presented for payment, and the check being dishonored when presented for payment, the policies lapsed for non-payment of the premiums due October 17, 1940, and

had never been reinstated at the time of the death of the insured (Pre-Trial Order-Tr. Page 46-47).

Upon the trial of the case the Court admitted testimony over defendant's objections relative to conversations between the insured and the soliciting agent and also testimony relative to the forwarding of the money order (Pl. Ex. 8c) to defendant by Mrs. Miller after she had been notified that the check had been dishonored. The admission of this testimony is included among the specifications of error.

At the conclusion of testimony the defendant moved for a directed verdict (Tr. Page 213) on the ground that there was no evidence that the premiums had been paid when due or during the grace period or at all, and there was no evidence binding on the defendant of any agreement to accept the check dated November 17, 1940, or that it would accept the check as absolute or unconditional payment of the premiums. The Court denied the motion and this is assigned as error.

The Court in its instructions to the jury failed to distinguish between conditional and unconditional payment and submitted to it the question of the local cashier's authority to accept the check as absolute payment of the premiums and refused to give certain of defendant's instructions and gave certain other instructions, all of which are assigned as error.

SPECIFICATIONS OF ERROR TO BE RELIED UPON

1. The Court, over the objection of the defendant that the soliciting agent, A. E. Yount, had no authority to bind the Company in respect to the premiums in question and that he had no authority to collect them, and any conversations which he had with the insured were not binding on the Company, permitted the witness A. E. Yount to testify to a conversation he had with the insured relative to the payment of the premiums in question, and the witness in substance stated that he had gone over to deliver to the insured a policy on the insured's boy's life, and in the course of delivering the policy the insured asked about the settlement for it and whether he might arrange for thirty days in which to clear it; that when he had arranged for the policy for the boy he reminded the insured that he must mail a check on his own policies by the 17th, and the insured said: "I will give you a check for it now if you know how much it is." So he told the insured the amount and told him to make the check to the Company (Tr. Page 137-142).
2. The Court over the objection of the defendant that it was incompetent, irrelevant and immaterial and that the testimony with respect thereto did not show

that the entries were made at or about the time of the issuance of the check in question, admitted in evidence the check stub of the check the insured gave in payment of the premiums, which stub contained figures purporting to show a balance in the checking account (Pl. Ex. 6. Tr. Pages 160-162).

3. The Court over the objection of the defendant that the matter was subsequent to the transaction involving the alleged payment of premiums and subsequent to the transaction which the plaintiffs claimed constituted payment, permitted the witness Reta D. Miller to testify in substance that when she got the letter (Pl. Ex. 3) returning the check (Pl. Ex. 4) she got a money order for \$49.07 and mailed it to the defendant, and that the money order was returned to her by defendant (Tr. Pages 152-156).

4. The Court over the objection of the defendant that it was something that occurred subsequent to the transaction which plaintiffs claimed constituted payment of the premiums in question and had no bearing on the case, admitted in evidence a letter dated December 2, 1940, from R. A. Durham, cashier, to Warren L. Miller, returning money order sent in by Mrs. Miller (Pl. Ex. 8a. Tr. Pages 123-125).

5. The Court over the objection of the defendant that it was something that occurred subsequent to the

transaction which plaintiffs claimed constituted payment of the premiums in question and had no bearing on the case, admitted in evidence a postoffice money order mailed to the defendant by Mrs. Miller (Pl. Ex. 8c. Tr. Pages 125-127).

6. The Court denied the motion of the defendant at the close of the testimony for an order directing the jury to return a verdict in favor of the defendant, which motion was based on the ground that there was no evidence that the premiums due on October 17, 1940, had been paid when due or during the grace period, or at all; that there was no evidence of any agreement binding upon the defendant that it would accept or that it did accept the check dated November 17, 1940, as absolute or unconditional payment of the premiums in question; that there was no evidence of waiver of the provisions of the policies with respect to payment of the premiums and there was no evidence that the time of the payment of the premiums was extended beyond the grace period or at all (Tr. Pages 213-214).

7. In its charge to the jury the Court said:

"The controlling question, I am sure you understand—you are veterans in jury service now—the controlling question in this case is whether the check was given and accepted as payment of the premium that came due on October 17th, although the grace period had not yet expired.

"Now just a word about that. Ordinarily a check is given and accepted in business transactions conditional on its being paid; it is not payment as such; but in this case I submit to you as a question for your determination, under the facts of this case, the check being dated a few days later than it was written, and under all the other facts in the case, whether there was a different intention on the part of both parties in this case, and in view of your own business transactions where, as I say, a check is given and taken conditional on payment when it is presented. The plaintiff has the burden of proof as to that question. She must satisfy you, by a preponderance of the evidence, to be entitled to your verdict, which means a greater weight of the evidence, that the check was given and accepted as payment of the premium, to be entitled to your verdict; and unless you are so satisfied by a preponderance of the evidence as to the intention of the parties—that means both parties—then your verdict must be for the defendant.

"Now just to state it again, Did Miller intend that the check was being given by him as payment? By that, from his point of view, meaning simply this: That whereas up to that time he had no obligation to pay the insurance premium—I think you understand that clearly; I will mention it again; the lawyers have mentioned it on both sides—in the ordinary insurance transaction, and that is true of this one, there is no obligation to pay the premium. You may pay the premium, and if you do you keep the policy in force; if you don't pay the premium the policy lapses.

"Now the question is in this case, Did Miller intend to bind himself, and did he bind himself, to pay the premium? Was his intention in giving that check, so far as his part of it was concerned, that it should be obligatory upon him and be enforceable against him so that when he executed the check he had in mind that he had committed and obligated himself to pay the premium by giving that check?

"But that would not be enough to entitle the plaintiff to recover. You must consider also the defendant's point of view. There must be a meeting of the minds, as Mr. Davis said, before the plaintiff would be entitled to recover. Did the defendant treat the transaction the same way? Under all the circumstances of the case, did they treat this check differently than the ordinary check, which as I say, is given and taken conditional on its payment? When they laid the check aside, as apparently they did for a few days, and thereafter put it through for deposit on the next business day after its due date, was it the intention of the defendant in thus dealing with the check treat that as payment; by that I mean to treat that as a binding obligation given to them by Miller, which they could enforce in the way that all obligations are enforced? If both the giver of the check intended it to be as payment and intended to create a binding obligation on him, and if the receiver of the check, the defendant, treated the transaction the same way, that the check was a binding obligation and could be enforced, and there was a meeting of the minds on that, then that would be payment by the check and that would entitle

the plaintiffs to recover in this case, should you so find from a preponderance of the evidence."

(Tr. Pages 221-224.)

The defendant objected to these instructions on the ground that the agents who acted in that regard were not authorized to make any agreement or to accept the check as unconditional payment, and furthermore the instructions referred to payment and omitted the unconditional feature of the payment and omitted to state that a check may be taken as conditional payment, and in that event payment is not finally made unless the remittance is paid (Tr. Pages 224-225).

8. In its charge to the jury the Court said:

"The defendant claims that Mr. Durham, the cashier, had no authority to accept the check as payment, and I instruct you gentlemen, that you must find as to that also before the plaintiff is entitled to recover; you must find as to whether Mr. Durham did have authority.

"If you find from all you have heard here that Mr. Durham had authority to bind the company by accepting the check as payment, then the plaintiff would be entitled to your verdict, if the defendant, acting through him, did, in fact, accept it as payment. But should you not find as to any one of those two things, the plaintiffs would not be entitled to recover. Did Mr. Durham have authority to bind the company, to accept the check

as payment? Did he, in fact, acting for the company, treat the check as a binding obligation and accept it for the company as payment? I submit both of those questions to you as questions of fact."

(Tr. Pages 224-225.)

The defendant objected to these instructions on the ground that the evidence was uncontradicted as to the authority of R. A. Durham; that it is a matter of law and not a matter of fact or an issue to be submitted to the jury, and the record shows that Mr. Durham had no authority to waive any requirements or rights, that no one had any authority to collect the premiums or to agree to the payment of a premium except in exchange for the Company's official premium receipt (Tr. Page 234).

9. The defendant requested the Court to give the following instructions:

III.

"You are instructed with respect to the time within which the premiums on said policies might be paid that the 31st day after the due date of the premiums due on October 17, 1940, fell on a Sunday, and therefore the insured had all of the next day or all of Monday, the 18th day of November, 1940, within which to pay the premiums due on October 17, 1940.

IV.

"The premiums due on said policies were payable in cash at the Home Office of the Company or to a duly authorized cashier of the company, but only in exchange for the company's official premium receipt signed by certain officers of the company and counter-signed by the person receiving the premiums. No person had any authority to collect a premium unless he then held the official premium receipt.

V.

"The evidence in this case shows that on November 13, 1940, the insured gave to A. E. Yount, a soliciting agent of the defendant, a check payable to the order of the defendant in the amount of premiums due on said policies on October 17, 1940. This check was dated November 17, 1940. There is no evidence that Mr. Yount had the official premium receipts for said policies. You are, therefore, instructed that Mr. Yount had no authority to collect the premiums due on said policies and the giving of the check to Mr. Yount did not constitute payment of the premiums.

VI.

"Under the terms of the policies no agent is authorized to make or modify the policies or to extend the time for the payment of premiums, or to waive any lapse or forfeiture or any of the company's rights or requirements.

VII.

"The plaintiff claims that the check, dated November 17, 1940, and given to Mr. A. E. Yount on November 13, 1940, and subsequently delivered to the cashier's office of the Oregon Branch Office, was accepted by the defendant company as payment of the premiums due on October 17, 1940.

"You are instructed that ordinarily a check is not unconditional payment, but such payment is conditioned upon the check being honored when presented for payment, and in the absence of an agreement between the insured and the defendant to accept said check as unconditional payment the check does not constitute payment unless honored when presented for payment.

"In this connection you are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that there was such an agreement between the insured and the defendant made by a person having authority to make such an agreement.

"You are further instructed that if such an agreement was made by an unauthorized agent, then before such agreement could be binding upon the defendant the agreement must be ratified by a person having authority to do so, and the burden of proof is upon the plaintiffs to show such ratification by a preponderance of the evidence.

VIII.

"The evidence shows that the cashier of the Oregon Branch Office of defendant on November 18, 1940, mailed to the insured the official premium

receipts covering the premiums due on the policies on October 17, 1940. These receipts contained the following condition:

‘If remittance otherwise than in cash has been made, this receipt shall be void if payment of such remittance is not actually received by the Company.’

“The evidence further shows that the check dated November 17, 1940, for \$48.72 was dishonored by the bank on which the check was drawn because the drawer of the check did not have sufficient funds on deposit in the bank to cover the check.

“The mailing of the official premium receipts is not evidence that the company accepted the check as unconditional payment of the premiums, and in view of the evidence that the check was not honored when presented for payment the premium receipts could not be considered as evidence showing payment of the premiums due October 17, 1940.

IX.

“The evidence shows that upon receipt of a letter from the cashier of the Oregon Branch Office of the defendant returning the dishonored check to the insured, the plaintiff, Reta D. Miller, mailed a postoffice money order to the defendant on November 28, 1940. You are instructed that the mailing of this postoffice money order did not constitute payment of the premiums due on the poli-

cies and had no effect whatsoever upon the issues of this case."

(Tr. Pages 237-240.)

The Court refused to give these instructions or any of them, and the defendant objected to this refusal on ground that the requested instructions accurately stated the law and should be given in the form submitted in order to get the defendant's theory before the jury (Tr. Page 235).

ARGUMENT

SPECIFICATIONS OF ERRORS 1 TO 5 INCLUSIVE

1. The Court, over the objection of the defendant that the soliciting agent, A. E. Yount, had no authority to bind the Company in respect to the premiums in question and that he had no authority to collect them, and any conversations which he had with the insured were not binding on the Company, permitted the witness A. E. Yount to testify to a conversation he had with the insured relative to the payment of the premiums in question, and the witness in substance stated that he had gone over to deliver to the insured a policy on the insured's boy's life and in the course of delivering the policy the insured asked about the settlement for it and whether he might arrange for thirty days in which to clear it; that when he had arranged for the policy for the boy he reminded the insured that he must mail a check on his own policies by the 17th, and the insured said: "I will give you a check for it now if you know how much it is." So he told the insured the amount and told him to make the check to the Company (Tr. Page 137-142).

2. The Court over the objection of the defendant that it was incompetent, irrelevant and immaterial that the testimony with respect thereto did not show that

the entries were made at or about the time of the issuance of the check in question, admitted in evidence the check stub of the check the insured gave in payment of the premiums, which stub contained figures purporting to show a balance in the checking account (Pl. Ex. 6. Tr. Pages 160-162).

3. The Court over the objection of the defendant that the matter was subsequent to the transaction involving the alleged payment of premiums and subsequent to the transaction which the plaintiffs claimed constituted payment, permitted the witness Reta D. Miller to testify in substance that when she got the letter (Pl. Ex. 3) returning the check (Pl. Ex. 4) she got a money order for \$49.07 and mailed it to the defendant, and that the money order was returned to her by defendant (Tr. Pages 152-156).

4. The Court over the objection of the defendant that it was something that occurred subsequent to the transaction which plaintiff claimed constituted payment of the premiums in question and had no bearing on the case, admitted in evidence a letter dated December 2, 1940, from R. A. Durham, cashier, to Warren L. Miller, returning money order sent in by Mrs. Miller (Pl. Ex. 8a. Tr. Pages 123-125).

5. The Court over the objection of the defendant that it was something that occurred subsequent to the

transaction which plaintiffs claimed constituted payment of the premiums in question and had no bearing on the case, admitted in evidence a postoffice money order mailed to the defendant by Mrs. Miller (Pl. Ex. Sc. Tr. Pages 125-127).

POINTS AND AUTHORITIES

Evidence to be admissible must correspond with the substance of the material allegations and be relevant to the questions in dispute. Collateral questions should be avoided.

Sec. 2-226, *O.C.L.A.*

20 American Jurisprudence, Page 238, Sec. 245

ARGUMENT

Sec. 2-226, *O.C.L.A.* provides as follows:

"Evidence shall correspond with the substance of the material allegations, and be relevant to the questions in dispute. Collateral questions shall therefore be avoided. It is, however, within the discretion of the Court to permit inquiry into a collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

The rule is stated in *20 American Jurisprudence*, Page 238, Sec. 245 as follows:

"Evidence offered by either party in the trial of the case, to be admissible against the objection of the other party, must be relevant to the issues of the case and tend to establish or disprove them; matters which are wholly irrelevant and which are incapable of affording any legitimate presumption or inference regarding the fact or facts in issue must be excluded."

The general proposition that evidence to be admissible must be relevant to the questions in dispute is so well settled that citation of further authorities is deemed unnecessary. It remains to apply the proposition to the particular case.

In this case the question to be determined was whether the policies of insurance were in force on the date of the death of the insured. This depended on whether the premiums due on October 17, 1940, had been paid. In the Pre-Trial Order the admitted facts showed that on November 13, 1940, A. E. Yount, a soliciting agent of the defendant called on the insured at McMinnville, Oregon, at which time the insured gave to Mr. Yount a check dated November 17, 1940, payable to the order of the defendant in the amount of the premiums; that Mr. Yount returned to Portland and turned the check over to the defendant's cashier,

who held it until Monday, November 18, 1940, (November 17, 1940, fell on Sunday) when he entered it upon his records, mailed out the official premium receipts, and deposited the check; that when the check reached the bank upon which it was drawn it was dishonored for insufficient funds; that when the check was returned to the cashier's office he took up the returned check and mailed it to the insured and requested that he return the official premium receipts (Tr. Pages 37-39).

The plaintiff contended that the check was accepted by the defendant as full payment of the premiums (Tr. Page 46). The defendant contended that there was no agreement either by an authorized or unauthorized person to accept the check as unconditional payment, and that the check was accepted conditionally upon the check being honored when presented for payment (Tr. Page 47). These contentions set out the issue to be tried and the result of the case depended upon this issue and nothing else.

The trial Court permitted the witness A. E. Yount to testify with respect to the delivery of another policy to the insured on the insured's boy's life and with respect to the settlement of the premium on that policy and the securing of a check from the insured in payment of the premiums in question. There was nothing

in this transaction relevant to whether the check was either given or accepted as unconditional payment of the premiums in question and this testimony in no way tended to prove or contradict the contentions of either party. Furthermore, the agent had no authority to collect these premiums. It was agreed in the applications for the policies "that the soliciting agent is not authorized to collect any premium for the insurance hereby applied for except the first premium thereon * * * * *." (Tr. Pages 99 and 109.)

The trial Court admitted into evidence the check stub of the check issued by the insured in payment of the premiums. This check stub showed a balance carried forward after deducting the amount of the check. The only purpose this stub could serve was to show that the insured computed a sufficient amount in the bank to honor the check. There was no showing as to when the entry on the stub was made. The entry did not tend to prove or disprove whether the check was given or accepted as unconditional payment of the premiums. Assuming that the exhibit proved that the insured thought he had sufficient money on deposit to honor the check, there was no showing that it was called to defendant's attention, and even if it had been it would not bear on the question of whether the defendant accepted the check unconditionally.

The trial Court permitted the witness Reta D. Miller to testify that when the defendant returned the dishonored check and requested a return of the official premium receipts she secured a postoffice money order for the amount of the premiums and interest and mailed it to defendant. The Court also admitted in evidence as exhibits the postoffice money order and a letter from the defendant returning the money order.

This testimony by Mrs. Miller and the exhibits all referred to matters which occurred subsequent to the transaction which the plaintiffs claimed constituted the giving and acceptance of the check as unconditional payment of the premiums. Such evidence did not tend to prove or disprove whether the check was accepted conditionally or unconditionally. If the check was accepted as plaintiffs contended the act of acceptance was completed when the defendant accepted the check, if it did. Anything that transpired subsequent to the return of the dishonored check to the insured would have no bearing upon the questions in dispute.

The admission of the evidence referred to in Specifications of Error 1 to 5 inclusive could serve no other purpose than to confuse the issues and prejudice the cause of the defendant in the eyes of the jury, and appellant believes that it did so confuse and prejudice the jury, and that its admission by the Court constituted error which justifies the reversal of this case.

ARGUMENT

SPECIFICATION OF ERROR 6

6. The Court denied the motion of the defendant at the close of the testimony for an order directing the jury to return a verdict in favor of the defendant, which motion was based on the ground that there was no evidence that the premiums due on October 17, 1940, had been paid when due or during the grace period, or at all; that there was no evidence of any agreement binding upon the defendant that it would accept or that it did accept the check dated November 17, 1940, as absolute or unconditional payment of the premiums in question; that there was no evidence of waiver of the provisions of the policies with respect to payment of the premiums and there was no evidence that the time of the payment of the premiums was extended beyond the grace period or at all (Tr. Pages 213-214).

POINTS AND AUTHORITIES

1. Payment of a premium is not effected by the mere giving of a check, but is conditioned upon the check being honored when presented for payment in the absence of an agreement to accept the check as unconditional payment.

Smith v. Mills, 112 Ore. 496; 230 Pac. 350

Johnson v. Iankovetz, 57 Ore. 24; 110 Pac. 398

Seaman v. Muir, 72 Ore. 583; 144 Pac. 121

Kansas City Life Ins. Co. v. Davis, C.C.A. 9th Circuit, 95 Fed. (2d) 952

Texas Mutual Life Insurance Association v. Tolbert, 134 Texas 419; 136 S. W. (2d) 584

Wohrman v. Equitable Life Assurance Society, 1 N. Y. Supplement (2d) 331

48 *Corpus Juris*, Pages 617, 619

29 *American Jurisprudence*, Page 342

Couch Encyclopedia of Insurance Law, Vol. 3, Sec. 603

2. The burden is upon the person claiming that a check was accepted as payment to prove an agreement to accept the check as payment by clear and satisfactory evidence.

Joppa v. Clark Commission Co., 132 Ore. 21; 281 Pac. 834

Turner v. New York Life Insurance Co., C.C.A. 8th Circuit; 100 Fed. (2d) 193

Central States Life Insurance Co. v. Johnson, 181 Okla. 367; 73 Pac. (2d) 1152

Naylor v. Illinois Bankers Life Assurance Co., 199 Ark. 463; 134 S. W. (2d) 13

Hare v. Connecticut Mutual Life Insurance Co., 114 W. Va. 679; 173 S. E. 772

Philadelphia Life Insurance Co. v. Hayworth, C.C.A. 4th Circuit; 296 Fed. 339

Great Southern Life Insurance Co. v. Brooks, 166 Okla. 123; 26 Pac. (2d) 430

Hayworth v. Philadelphia Life Insurance Co., 190 N.C. 757; 130 S. E. 612

ARGUMENT

The policies of insurance involved herein (Pl. Ex. 1 and 2) provided for the payment of quarter annual premiums. A premium became due on each policy on October 17, 1940. The policies provided for a grace period of thirty-one days. The policies further provided that all premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized cashier of the Company, but only in exchange for the Company's official prem-

ium receipt, and no person had any authority to collect a premium unless he then held the official premium receipt. The policies further provided that no agent was authorized to make or modify the contract or to extend the time for the payment of premiums, or to waive any lapse or forfeiture or the Company's rights or requirements (Tr. Pages 19-21 and 27-29).

The applications which were made a part of the contract provided that only the President, a Vice-President, a Secretary or the Treasurer of the Company could make, modify or discharge contracts or waive any of the Company's rights or requirements. (Tr. Pages 99 and 109-110.)

The evidence showed that on November 13, 1940, the insured at McMinnville, Oregon, gave to A. E. Yount, a soliciting agent of defendant, a check payable to the defendant in the amount of the quarter annual premiums due October 17, 1940. The check was dated November 17, 1940, which day fell on Sunday. Mr. Yount did not have the official premium receipts with him. He returned to Portland and turned the check over to the cashier's office of the Oregon Branch Office. The check was held by the cashier's office until Monday, November 18, 1940, which was the first banking day after the date of the check. Neither the banks nor the cashier's office were open on Sun-

day. The check was deposited on November 18, 1940, and the cashier on that day made his entries on his record and mailed to the insured the official premium receipts. These receipts provided:

“If remittance otherwise than in cash has been made this receipt shall be void if payment of such remittance is not actually received by the Company.”

The check reached the bank on which it was drawn and was presented for payment on November 20, 1940. It was dishonored because of insufficient funds. The check was returned to the cashier's office by the bank in which it had been deposited on Monday, November 25, 1940. On the next day the cashier returned the check by mail to the insured and requested that the official premium receipts be returned to him and advised the insured that the policies had lapsed, and he then reversed the entries made by him on November 18, 1940.

The Oregon Supreme Court in *Seaman v. Muir*, 72 Ore. 583; 144 Pac. 121, in a case involving the sale of property, said:

“Moreover, the execution and delivery of negotiable paper is not payment unless the same is accepted by the parties in that sense.”

In *Johnson v. Iankovetz*, 57 Ore. 24; 110 Pac. 398, the Oregon Supreme Court in a case involving the sale

of two guns where payment was made by check held that the delivery of the guns to the purchaser was conditional upon the check being honored, and the purchaser acquired no title to them when the check was dishonored.

In *Smith v. Mills*, 112 Ore. 496; 230 Pac. 350, the plaintiff was the owner of a certain note and mortgage and sold and assigned the same to the defendant. The defendant gave plaintiff a check in payment. Upon presentation of the check for payment, payment was refused, the bank having closed its doors prior to the presentment. The Oregon Supreme Court said:

“In the absence of any agreement, either expressed or clearly implied, payment means the discharge of a debt or obligation in money, and in such case money is the sole medium of payment. (citing cases)

“But anything of value delivered by the debtor and accepted by the creditor in discharge of the debt will constitute payment. (citing cases) In such case it is the distinct agreement of the creditor to accept the thing in discharge of the debt that gives it the character of payment.

* * * * *

“In order that the acceptance of the cashier’s check shall discharge the debt, the transfer must be by an agreement of the parties with that intention. (citing cases)”

In *Texas Mutual Life Insurance Association v. Tolbert*, 134 Tex. 419; 136 S. W. (2d) 584, a check was sent to the company in payment of an assessment. Credit was given upon the books of the company. The check was dishonored when presented for payment because of insufficient funds. The Texas court held that the acceptance by a life insurance association of a check covering an assessment and deposit of the check for collection did not prevent a forfeiture of the certificate for non-payment where the check was dishonored, since crediting of the check on the association books did not constitute an unconditional payment of the assessment. A check sent by the insured to cover an assessment on the life certificate was accepted only conditionally and the burden rested on the insured to see that the check was honored when presented.

In *Wohrman v. Equitable Life Assurance Society*, 1 N. Y. Supplement (2d) 331, on the last day of grace the wife of plaintiff delivered to the teller of the defendant his check for the amount of the premium. A receipt was given which provided that it would not be binding until the defendant received the actual cash called for by the remittance. The defendant deposited the check and it was returned by the plaintiff's bank because of insufficient funds. The defendant immediately returned the check to the plaintiff with notice that the

policy had lapsed. Subsequently the plaintiff made a tender of the amount of the premium. The New York court held that the check was not in absolute payment of the premium, and was conditioned upon its payment by the plaintiff's bank, and that the defendant was justified in standing upon its rights and in declaring the policy lapsed when the check was returned to it unpaid.

In *48 Corpus Juris* on Page 617 the rule is stated as follows:

"The delivery to, or acceptance by, the creditor of his debtor's check, although for convenience often treated as the passage of money, is not payment, even though the check is certified before delivery, in the absence of any agreement or consent to receive it as payment, or any laches or want of diligence on the part of the creditor, or the negotiation of the check by him."

In *48 Corpus Juris* on Page 619 it is stated:

"A check is accordingly often referred to as conditional payment, the condition being its collectibility from the bank upon which it is drawn."

In *29 American Jurisprudence*, Page 342, is the following:

"The mere receipt of a check will not prevent a forfeiture of the policy for non-payment of premium, but if the check is accepted as payment of the premium, even though it turns out to be worthless, there is payment which will prevent a for-

feiture. The crux of the situation appears to be the question of acceptance. If the check is not received or accepted as payment, or pleaded as such, or ever paid, and the insured did not at any time after the check was drawn have funds in the drawee bank sufficient to pay it, the mailing and sending of the check is not a payment."

Vol. 3, *Couch Cyclopedia of Insurance Law*, Sec. 603, states:

"Generally speaking, payment of a premium is not effected by the mere giving of a check or draft, at least in the absence of an express agreement to the contrary. In other words, the mere sending and receipt of a check or certificate of deposit for the amount of a premium does not operate as a payment thereof in the absence of agreement, waiver or estoppel, unless it is accepted as such. Nor does the mere acceptance of a check conditional upon payment thereof when presented of itself effect payment * * * * *."

In *Joppa v. Clark Commission Co.*, 132 Ore. 21; 281 Pac. 834, the Oregon Supreme Court held that a promissory note or check given for an antecedent debt does not discharge the obligation in the absence of an agreement, express or implied, between the parties that it shall be given and accepted as payment, and that when a debtor gives his check for the amount of his indebtedness the *prima facie* presumption arises that the check is taken merely as conditional, not absolute payment.

The court also held that the mutual intention of the parties that a check shall be given and received as payment may be established by proof either of an express contract or a contract implied in fact, but in either case it must be proved by *clear and satisfactory* evidence.

In *Turner v. New York Life Insurance Co.*, 100 Fed. (2d) 193, toward the end of the grace period an arrangement was made whereby the remaining loan value on the policy would be utilized, and the loan plus the payment of \$130.83 would cover interest due on earlier loans and the premium due on the policy. The insured gave her check for \$130.83 stating in substance that at the time there were not sufficient funds in the bank to cover it but that there would be in a few days. The check was dated May 1st, 1934. It was deposited on May 7th. On May 11th or 12th the check was returned to the company because of insufficient funds. The company notified the insured of the return of the check and that it would be deposited again. The check was again returned. On May 15th the company placed the check in a letter addressed to the insured and stated that because of the dishonor of the check the premium had not been paid and the policy had lapsed and urged that an application for reinstatement be made. It was contended that the premium had been paid because

the check was accepted as unconditional payment and that therefore the company could not lapse the policy but could only sue upon the check. The 8th Circuit Court of Appeals applied the Missouri law to the effect that in the absence of an agreement between the parties that it is to be received as payment, the common law rule is that a draft or bill of exchange, acceptance, order or promissory note of the debtor, is not a payment or extinguishment of the original demand. Also, it is the general doctrine that the burden of proof to show that a special agreement to accept a check as absolute payment existed is upon the one so alleging. The court then said:

“In this situation the applicable rules of law are that the receipt of this check by the company was a conditional payment unless plaintiff is able to produce substantial proof that the check was accepted as absolute payment. The proof is not only lacking but the proof is directly to the contrary.”

In *Central States Life Insurance Co. v. Johnson*, 181 Okla. 367; 73 Pac. (2d) 1152, on the day before the policy would have lapsed the company received through the mail a check from the insured in payment of the premium. The company credited the insured's account and in due course transmitted the check for collection. The check was returned because of insufficient funds and it was charged to the insured's account. After the

check was returned the company notified the insured by letter that his policy had lapsed for non-payment of the premium; that the credit had been reversed on the books, and that the receipt formerly mailed to him was null and void, and also advised him that he was privileged to ask for reinstatement. The Oklahoma Supreme Court in its opinion said:

“Although the provision in a life policy for the payment of premium is not, in the strict sense, a debt, if the insured is to receive protection under the insurance contract, the insurer is not deprived of the right to consider a check given in payment of that protection as a conditional payment only, depending upon payment on due presentation. A check is never presumed to constitute payment of any obligation. The presumption is that it is accepted only conditionally upon its due payment. See *48 C. J.* 703. The burden is upon the one charging unconditional acceptance to show such acceptance. For the apparent purpose of avoiding undue hardship arising from the forfeiture of a policy, the courts have not required proof of an express agreement, as in case of debt, to accept unconditionally a check in payment of premiums, but have held that the insured or his beneficiary may prove acts, other than an express agreement, on the part of the insurer showing unconditional acceptance.

“The defendant’s evidence shows that on receipt of the check it mailed to the insured a receipt wherein the acceptance of the check was made conditional upon due payment thereof. Had it been admitted that this receipt was delivered to the

insured, the facts here would have been very similar to the facts in the case of *Great Southern Life Ins. Co. v. Brooks, supra*. There it was held that the trial court erred in not instructing a verdict for the defendant.

"The question of the conditional receipt is of no material consequence in cases of this character unless the plaintiff has produced evidence to establish his case sufficient for the jury's consideration. If plaintiff produce such evidence, and the issuance and delivery of the receipt is disputed, then there arises a question for the jury's determination. Its decision on such conflicting evidence would be binding on this court. But the plaintiff must produce evidence of the defendant's intention to accept the check unconditionally. That burden was upon her. There is no presumption favoring her contention. There is no burden upon the defendant to show its real intention unless she first establish her case. According to the clear holding in the Brooks case, above, an insurer may accept a personal check in payment of a life insurance premium, but such acceptance is conditional, in the absence of a contrary intention, upon due payment of the check. We hold that the presumption of conditional acceptance favors the insurer and that the burden is upon the insured or his beneficiary to prove a contrary intention on the part of the insurer.

"The acts of the insurer in accepting a check and attempting to cash the same in due course are insufficient evidence of an unconditional acceptance thereof in payment of a life premium. Such evidence is too conjectural to be submitted to a jury."

In *Naylor v. Illinois Bankers Life Assurance Co.*, 199 Ark. 463; 134 S. W. (2d) 13, the insured on April 27, 1938, mailed a check in payment of the premium due April 1, 1938, which check was received by the company on April 29, 1938. The company mailed a conditional receipt. The check was returned because of insufficient funds. The company notified the insured that the policy had lapsed and suggested he make application for reinstatement. The insured then sent a postoffice money order to cover the check, but the same was rejected. He later sent a cashier's check which was likewise rejected. The Arkansas Supreme Court held that the payment must be treated as conditional and not as absolute payment of the premium.

The cases, *Philadelphia Insurance Co. v. Hayworth*, 296 Fed. 339, and *Hayworth v. Philadelphia Insurance Co.*, 190 N. C. 757; 130 S. E. 612, involved the same parties and the same policy. The case was first started in the state court, which was removed to the Federal Court. After an adverse decision in the District Court the company appealed and the Circuit Court of Appeals for the 4th Circuit reversed and remanded the case. The plaintiff took a voluntary non-suit and started over in the state court, keeping the demand lower than the jurisdictional amount for the removal to the Federal Court.

The facts of the cases show that when the second premium became due the insured paid defendant some cash and delivered to the company three notes of \$25.00 each. The notes provided that if not paid at maturity all further liability under the policy should immediately cease and determine. When the second note became due the company agreed to extend its payment to June 6, 1922, upon receipt of an approved personal health certificate and a check for \$25.00 post dated June 6, 1922, and on receipt thereof advised the insured by letter that it had extended the time for the payment of the note to June 6, 1922, on which date the check would be deposited. The check was written May 8, 1922, and was deposited for collection June 7, 1922, and was presented at the payee bank on June 9, 1922. Payment was refused because of insufficient funds. The Circuit Court of Appeals in its opinion said:

“In some comments filed by the learned judge below at or about the same time he allowed the writ of error, he expressed the opinion that defendant had accepted in payment of the note of March 24th the post dated check and had relinquished its right to forfeit the policy for non-payment of the former instrument. This view is strongly urged upon us by the able and zealous counsel for the defendant. The letter of May 11th makes clear that the defendant did not at that time accept the check as payment of the note, for it said it would hold the latter until the date the check bore. It

is urged that the return of the note to the insured at the same time defendant deposited the check amounts to a non-conditional acceptance by it of the check as payment of the note. To our apprehension the law is clearly otherwise. An agreement that a check is received in satisfaction of a note is not implied from the surrender or cancellation of the note. Until the check was paid the note was in force, and unless it was paid at the time to which it was extended, the policy was by its terms forfeited. Forfeitures, it is true, are not favored in the law, but promptness of payment is essential in the business of life insurance. *New York Life Insurance Co. v. Statham*, 92 U. S. 24; 23 L. Ed. 789. If there is any real ambiguity in the provisions of a policy providing for forfeiture for non-payment, they will, of course, be resolved against the insurer, but if their meaning to the ordinary reader is plain, there is no reason why they should not be enforced. *New York Life Insurance v. Statham*, 92 U. S. 24; 23 L. Ed. 789; *Thompson v. Insurance Co.*, 104 U. S. 252; 26 L. Ed. 765; *Knickerbocker Life Insurance Co. v. Pendleton*, 112 U. S. 696; 5 Sup. Ct. 314; 28 L. Ed. 866; *Iowa Life Insurance Co. v. Lewis*, 187 U. S. 335, 348; 23 Sup. Ct. 126; 47 L. Ed. 204."

The North Carolina Court referred to and approved the opinion of the Circuit Court of Appeals and in its opinion said:

"The premium note was not paid. A worthless check is not a payment. There is no fact in the complaint that tends to show that the check was

accepted as payment. It was a conditional payment, and when it was not paid the condition which prevented it from operating as a payment happened and the policy lapsed. The failure to have the funds in the bank to meet the check was the fault of the drawer, and no loss resulted from any delay on the part of the payee."

The case of *Kansas City Life Insurance Co. v. Davis*, C.C.A. 9th Circuit; 95 Fed. (2d) 952, states the rule as follows:

"The law is settled that a check made in payment of insurance premiums is taken conditionally and subject to its return in cash, unless there is a special agreement that such check is received in absolute payment."

It should be noted that in that case the company received the insured's check and four days later deposited it in the bank for collection and forwarded certificates of reinstatement to the insured with a letter stating that the application for reinstatement had been approved and it had accepted the deposit tendered in payment of the premiums. The Court said on Page 957:

"There is no evidence in this case supporting a special agreement to take this check as absolute payment."

The above authorities clearly establish the rule that a check made in payment of insurance premiums is taken conditionally and subject to its return in cash,

unless there is a special agreement that the check is received as absolute payment, and that the burden is upon the one so asserting to show such an agreement by substantial evidence. The plaintiffs in this case have the burden of showing first that there was an agreement to accept the check as absolute payment, and second, that the agreement was made by one having authority to so accept the check.

It is appellant's contention that the evidence in this case utterly fails to show an agreement to accept the check as absolute payment, but to the contrary did show that the check was received conditional upon it being honored when presented. Furthermore, even though it could be said from this evidence that the cashier agreed to accept the check as absolute payment, there is no evidence showing that he had authority to so accept the check. To the contrary the evidence showed by the policies themselves that he had no such authority. The question of the cashier's authority is further discussed under Specification of Error 8.

It is appellant's contention that at the close of the case when it moved for a directed verdict the Court should have allowed the motion, and that its failure to do so constitutes error, and this Court should reverse the trial court and direct that a judgment be entered in favor of the defendant on both causes of action.

ARGUMENT

SPECIFICATION OF ERROR 7

7. In its charge to the jury the Court said:

"The controlling question, I am sure you understand—you are veterans in jury service now—the controlling question in this case is whether the check was given and accepted as payment of the premium that came due on October 17th, although the grace period had not yet expired.

"Now just a word about that. Ordinarily a check is given and accepted in business transactions conditional on its being paid; it is not payment as such; but in this case I submit to you as a question for your determination, under the facts of this case, the check being dated a few days later than it was written, and under all the other facts in the case, whether there was a different intention on the part of both parties in this case, and in view of your own business transactions where, as I say, a check is given and taken conditional on payment when it is presented. The plaintiff has the burden of proof as to that question. She must satisfy you, by a preponderance of the evidence, to be entitled to your verdict, which means a greater weight of the evidence, that the check was given and accepted as payment of the premium, to be entitled to your verdict; and unless you are so satisfied by a preponderance of the evidence as to the intention of the parties—that means both parties—then your verdict must be for the defendant.

"Now just to state it again, Did Miller intend that the check was being given by him as payment? By that, from his point of view, meaning simply this: That whereas up to that time he had no obligation to pay the insurance premium—I think you understand that clearly; I will mention it again; the lawyers have mentioned it on both sides—in the ordinary insurance transaction, and that is true of this one, there is no obligation to pay the premium. You may pay the premium, and if you do you keep the policy in force; if you don't pay the premium the policy lapses.

"Now the question is in this case, Did Miller intend to bind himself, and did he bind himself, to pay the premium? Was his intention in giving that check, so far as his part of it was concerned, that it should be obligatory upon him and be enforceable against him so that when he executed the check he had in mind that he had committed and obligated himself to pay the premium by giving that check?

"But that would not be enough to entitle the plaintiff to recover. You must consider also the defendant's point of view. There must be a meeting of the minds, as Mr. Davis said, before the plaintiff would be entitled to recover. Did the defendant treat the transaction the same way? Under all the circumstances of the case, did they treat this check differently than the ordinary check, which as I say, is given and taken conditional on its payment? When they laid the check aside, as apparently they did for a few days, and thereafter put it through for deposit on the next business

day after its due date, was it the intention of the defendant in thus dealing with the check treat that as payment; by that I mean to treat that as a binding obligation given to them by Miller, which they could enforce in the way that all obligations are enforced? If both the giver of the check intended it to be as payment and intended to create a binding obligation on him, and if the receiver of the check, the defendant, treated the transaction the same way, that the check was a binding obligation and could be enforced, and there was a meeting of the minds on that, then that would be payment by the check and that would entitle the plaintiffs to recover in this case, should you so find from a preponderance of the evidence."

(Tr. Pages 221-224.)

The defendant objected to these instructions on the ground that the agents who acted in that regard were not authorized to make any agreement or to accept the check as unconditional payment, and furthermore the instructions referred to payment and omitted the unconditional feature of the payment and omitted to state that a check may be taken as conditional payment, and in that event payment is not finally made unless the remittance is paid (Tr. Pages 234-235).

ARGUMENT

As shown by the authorities cited under Specification of Error 6, a check made in payment of insurance

premiums is taken conditionally and subject to its payment in cash unless there is a special agreement that such check is received in absolute payment. The trial Court in submitting this case to the jury gave the above instruction. The instruction as given stated that the controlling question was whether the check was given and accepted as payment of the premium. The instruction did not distinguish between conditional and unconditional payment. While the instruction did say that ordinarily a check is given and accepted in business transactions conditional on its being paid, it did not in referring to the payment of the premiums involved distinguish between conditional and unconditional payment so that the jury would understand that before they could bring in a verdict for plaintiffs they must find from the evidence that there was an agreement on behalf of the defendant to accept the check as unconditional payment, and that such agreement was made by one authorized to bind the defendant.

The instruction in referring to payment asks the jury to find whether the insured intended that the check was given by him in payment. Again it did not distinguish between conditional and unconditional payment. It further stated that the question in the case

is whether the insured bound himself to pay the premium—whether he intended in giving the check that it should be obligatory upon him to pay the premium. This was not the question in the case. The question in the case was whether there was an agreement to accept the check as unconditional payment, and this instruction did not fairly present that question to the jury.

ARGUMENT

SPECIFICATION OF ERROR 8

8. In its charge to the jury the Court said:

"The defendant claims that Mr. Durham, the cashier, had no authority to accept the check as payment, and I instruct you, gentlemen, that you must find as to that also before the plaintiff is entitled to recover; you must find as to whether Mr. Durham did have authority.

"If you find from all you have heard here that Mr. Durham had authority to bind the company by accepting the check as payment, then the plaintiff would be entitled to your verdict, if the defendant, acting through him, did, in fact, accept it as payment. But should you not find as to any of those two things, the plaintiffs would not be entitled to recover. Did Mr. Durham have authority to bind the company, to accept the check as payment? Did he, in fact, acting for the company, treat the check as a binding obligation and accept it for the company as payment? I submit both of those questions to you as questions of fact."

(Tr. Pages 224-225.)

The defendant objected to these instructions on the ground that the evidence was uncontradicted as to the authority of R. A. Durham; that it is a matter of law and not a matter of fact or an issue to be submitted

to the jury, and the record shows that Mr. Durham had no authority to waive any requirements or rights, that no one had any authority to collect the premiums or agree to the payment of a premium except in exchange for the Company's official premium receipt (Tr. Page 234).

POINTS AND AUTHORITIES

The insured was bound by the limitations of authority in the policies of insurance:

29 American Jurisprudence, Page 621, Sec. 817

Cranston v. West Coast Life Insurance Co., 63 Ore. 427; 128 Pac. 427

Bartnick v. Mutual Life Insurance Company of New York, 154 Ore. 446; 60 Pac. (2d) 943

New York Life Insurance Co. v. McCreary, C.C.A. 8th Circuit; 60 Fed. (2d) 355

ARGUMENT

In the application for the policies which were made a part of the contracts it was mutually agreed that only the President, a Vice-President, a Secretary or the Treasurer of the Company could make, modify, or discharge contracts.

The policies in addition to the provisions in the application provided that no agent was authorized to make or modify the contract or to extend the time for the payment of the premiums, or to waive any lapse or forfeiture or any of the Company's rights or requirements, and provided that all premiums after the first are payable on or before their due date at the Home Office of the Company or to a duly authorized cashier of the Company, but only in exchange for the Company's official premium receipts signed by the President, a Vice-President, a Secretary or the Treasurer of the Company and countersigned by the person receiving the premium.

In *Cranston v. West Coast Life Insurance Co.*, 63 Ore. 427; 128 Pac. 427, the application for the policy contained restrictions relative to the authority of the agent. The plaintiff relied upon the act of the agent in taking a note payable to himself as payment of the premium. The Oregon Supreme Court said:

"In the face of his own agreement in the application authorizing such conditions and his acceptance of the policy, the insured had no right to deal with Thurston in any way inconsistent with these terms for they acted as limitations on the authority of the soliciting agent within the knowledge of the assured."

In *Bartnick v. Mutual Life Insurance Company of New York*, 154 Ore. 446; 60 Pac. (2d) 943, the Oregon Supreme Court with respect to the question of a limitation on the agent's authority contained in the policy said:

"The insured is bound to know the terms of his policy."

In this case there is no evidence whatsoever that R. A. Durham had any authority to waive the requirements of the policy with respect to payment or to agree that the Company would accept a check as absolute payment of the premium. The evidence is entirely to the contrary and to the effect that he only accepted the check conditional upon its being honored when presented for payment.

Under the conditions of this case it was error for the trial court to submit to the jury the question of Mr. Durham's authority. It was a question of law for the Court to determine, and under the facts the Court should have held that Mr. Durham had no authority to accept the check as absolute or unconditional payment.

ARGUMENT

SPECIFICATION OF ERROR 9

9. The defendant requested the Court to give the following instructions:

III.

"You are instructed with respect to the time within which the premiums on said policies might be paid that the 31st day after the due date of the premiums due on October 17, 1940, fell on a Sunday, and therefore the insured had all of the next day or all of Monday, the 18th day of November, 1940, within which to pay the premiums due on October 17, 1940.

IV.

"The premiums due on said policies were payable in cash at the Home Office of the Company or to a duly authorized cashier of the company, but only in exchange for the company's official premium receipt signed by certain officers of the company and counter-signed by the person receiving the premiums. No person had any authority to collect a premium unless he then held the official premium receipt.

V.

"The evidence in this case shows that on November 13, 1940, the insured gave to A. E. Yount, a soliciting agent of the defendant, a check pay-

able to the order of the defendant in the amount of premiums due on said policies on October 17, 1940. This check was dated November 17, 1940. There is no evidence that Mr. Yount had the official premium receipts for said policies. You are, therefore, instructed that Mr. Yount had no authority to collect the premiums due on said policies and the giving of the check to Mr. Yount did not constitute payment of the premiums.

VI.

"Under the terms of the policies no agent is authorized to make or modify the policies or to extend the time for the payment of premiums, or to waive any lapse or forfeiture or any of the company's rights or requirements.

VII.

"The plaintiff claims that the check, dated November 17, 1940, and given to Mr. A. E. Yount on November 13, 1940, and subsequently delivered to the cashier's office of the Oregon Branch Office, was accepted by the defendant company as payment of the premiums due on October 17, 1940.

"You are instructed that ordinarily a check is not unconditional payment, but such payment is conditioned upon the check being honored when presented for payment, and in the absence of an agreement between the insured and the defendant to accept said check as unconditional payment the check does not constitute payment unless honored when presented for payment.

"In this connection you are instructed that the burden of proof is upon the plaintiff to establish by a preponderance of the evidence that there was such an agreement between the insured and the defendant made by a person having authority to make such an agreement.

"You are further instructed that if such an agreement was made by an unauthorized agent, then before such agreement could be binding upon the defendant the agreement must be ratified by a person having authority to do so, and the burden of proof is upon the plaintiffs to show such ratification by a preponderance of the evidence.

VIII.

"The evidence shows that the cashier of the Oregon Branch Office of defendant on November 18, 1940, mailed to the insured the official premium receipts covering the premiums due on the policies on October 17, 1940. These receipts contained the following condition:

'If remittance otherwise than in cash has been made, this receipt shall be void if payment of such remittance is not actually received by the Company.'

"The evidence further shows that the check dated November 17, 1940, for \$48.72 was dishonored by the bank on which the check was drawn because the drawer of the check did not have sufficient funds on deposit in the bank to cover the check.

"The mailing of the official premium receipts is not evidence that the company accepted the check as unconditional payment of the premiums, and in view of the evidence that the check was not honored when presented for payment the premium receipts could not be considered as evidence showing payment of the premiums due October 17, 1940.

IX.

"The evidence shows that upon receipt of a letter from the cashier of the Oregon Branch Office of the defendant returning the dishonored check to the insured, the plaintiff, Reta D. Miller, mailed a post office money order to the defendant on November 28, 1940. You are instructed that the mailing of this postoffice money order did not constitute payment of the premiums due on the policies and had no effect whatsoever upon the issues of this case."

(Tr. Pages 237-240.)

The Court refused to give these instructions or any of them, and the defendant objected to this refusal on the ground that the requested instructions accurately stated the law and should be given in the form submitted in order to get the defendant's theory before the jury (Tr. Page 235).

ARGUMENT

In its requested instructions the appellant correctly and accurately stated the law as applicable to this case as outlined in the authorities quoted under the above assignments of error. While the trial court gave portions of some of the instructions it did so in such a manner that the jury could not have accurately determined the law applicable to the facts of the case or the defendant's theory of the case. It is the appellant's contention that the refusal of the Court to give each of the instructions as requested constituted error.

CONCLUSION

It is appellant's contention that the trial court should have allowed its motion for a directed verdict at the conclusion of the testimony. There was no testimony to sustain plaintiffs' contention that the check which the insured gave in payment of the premiums was accepted as absolute or unconditional payment. This Court should reverse the trial court and direct that a judgment be entered in favor of appellant on both causes of action.

If the Court is of the opinion that the appellant was not entitled to a directed verdict, then the case should be reversed and a new trial granted in view of the error of the trial court admitting prejudicial testimony on irrelevant matters and in view of errors in the instructions to the jury.

Respectfully submitted,

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In the United States Circuit Court of Appeals

For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation, Appellant

vs.

RETA D. MILLER, and WARREN D. MILLER, MARCIA
M. MILLER, Minors, by Reta D. Miller,
Guardian, Appellees

APPELLEES' BRIEF

Upon Appeal from the District Court of the United States
for the District of Oregon

HON. CLAUDE McCOLLOCH, Judge

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Masonic Building,
McMinnville, Oregon

F I L E D

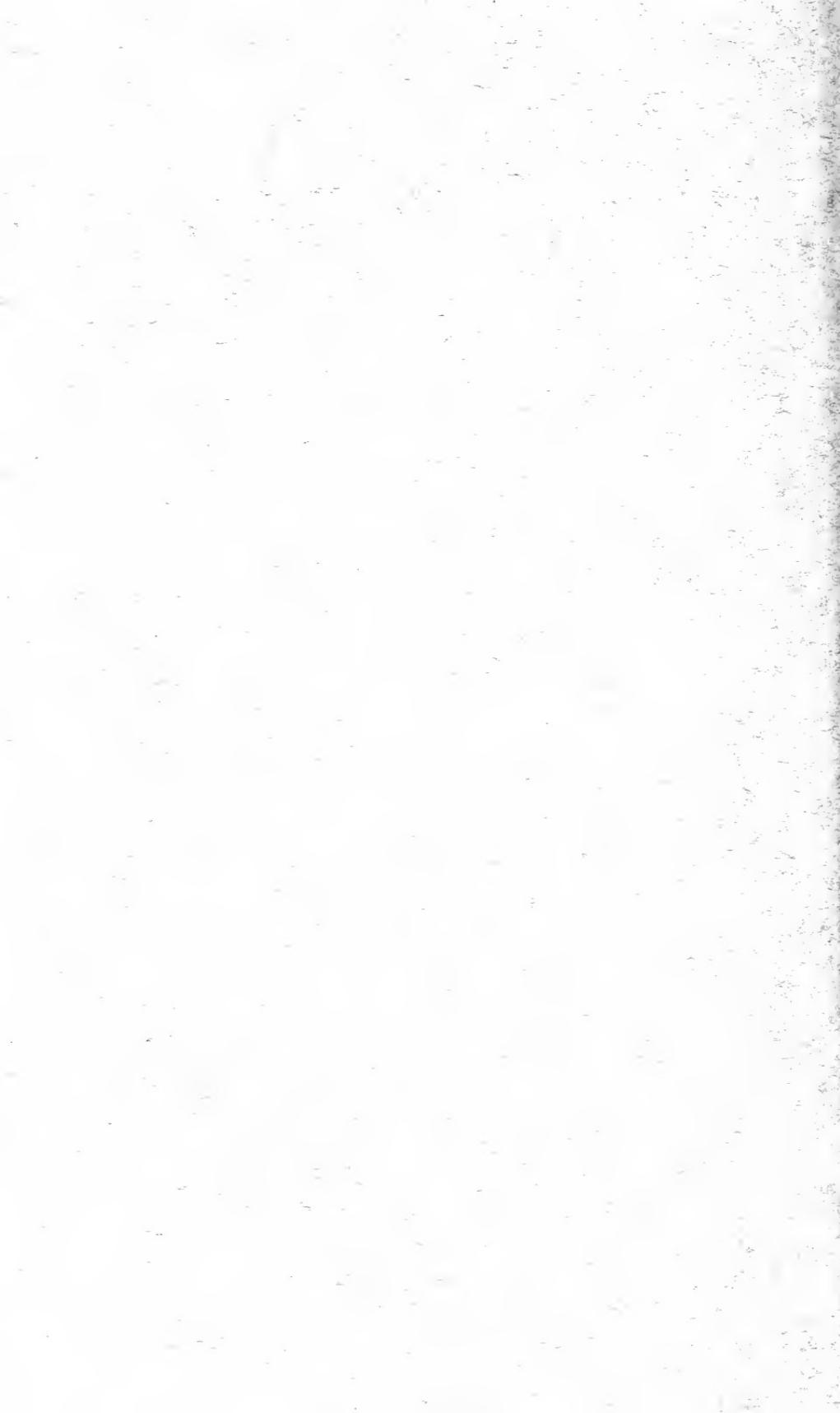
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Sec. 101-505 O. C. L. A.	43, 44
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190 N. C. 757; 130 S. E. 612	22
14 R. C. L. 339	45
University of Pittsburgh Law Review, Vol. 3, p. 395	24, 27
33 Wds. and Phs. (Perm. Ed.) p. 123	24
3 Williston on Contracts (Rev. Ed.) (1936)	15
Sec. 732 pp. 2079-2082	15
29 Yale Law Journal, 321-325 (1919)	24

In the United States Circuit Court of Appeals

For the Ninth District

NEW YORK LIFE INSURANCE COMPANY, a corporation, Appellant,
vs.
RETA D. MILLER and WARREN D. MILLER, MARCIA M. MILLER, Minors, by Reta D. Miller, Guardian, Appellees. } No. 10258

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon

HON. CLAUDE McCOLLOCH, Judge.

STATEMENT OF FACTS

The appellees, are the widow and two minor children of Warren L. Miller, deceased. Decedent was a farmer residing near McMinnville, Oregon, and was insured by the New York Life Insurance Company, the appellant herein.

The quarter annual premiums on the two Life Insurance policies held by the decedent (Pl. Ex. 1 and 2. Tr. ps. 93-116) became due and payable on October

17, 1940, in the sums of \$28.62 and \$20.10 respectively. The aggregate amount of both policies being the sum of \$48.72.

A. E. Yount, for 16 years a duly licensed soliciting agent of the appellant, and had known the decedent, Miller for 18 or 20 years; "when he was in grade school. I was Y. M. C. A. secretary and he was in camp with me when he was in Bridgeport," (Tr. p. 134) He had solicited and sold to Miller the two life insurance policies involved herein, in the appellant company.

Yount called as a witness on behalf of the appellees, at the trial, said he called on Warren L. Miller, on November 13, 1940, while on a tractor plowing on his ranch about 3 miles northeast of McMinnville, Oregon, for the purpose of delivering a policy in the appellant company on the life of Warren D. Miller, one of the appellees, and son of Warren L. Miller.

"The Court: There are two other policies in this case. This explains how this gentleman happened to go to see him that day."

"The witness: Then when we fixed up and arranged for the policy for the boy, his son, then I said to him, '*Now don't forget that your own policies—you must mail us your check by the 17th.*' 'Well,' he said, 'I will give you a check for it now if you know how much it is.'"

"The Court: You were talking to him on Wednesday, the 13th?"

"A. I was talking to him on the 13th. I am not sure of the day, your Honor, without looking it up on the calendar, but it was on the 13th day of November, because that is the boy's birthday. So he said, 'I will give you a check for it now if you know the amount'. So *I told him the amount*, and so he started to write the check and I said, '*Make the check to the company.*'— He made the check to the company and he gave it to me I noticed that *the amount was correct* and *was made to the company*, and otherwise than that I paid no attention to him—I paid no attention to it. *I don't recall that I gave a receipt for it at the time.*" (Tr. p. 142).

"The Court: Go ahead now."

"A. That pretty well closed the incident. He got on the tractor and went to work, I came back to Portland and *I turned the check over to the cashier's office and asked that receipts be mailed.*"

"The Court: That afternoon?"

"A. *That afternoon, yes, sir.*" The receipts referred to (Df. Ex. 10 and 11 Tr. p. 182 and 183), were not mailed until November 18th.

The check was postdated November 17, 1940, paying to New York Life Insurance Co., for \$48.72, and

delivered by Yount to the cashier, R. A. Durham, in charge of Appellants Oregon branch office, in Portland, between 3 and 4 o'clock on the afternoon of the same day, which was held, by the cashier or the Oregon branch office until November 18, 1940, when it was endorsed and deposited to the credit of the appellant company in the U. S. National Bank of Portland, Oregon.

Mr. Durham called as an adverse witness by the plaintiff testified that he had been the cashier for the New York Life Insurance Co. in Portland, Oregon. About 19 years, in charge of its Oregon branch office.

“A. Well, in charge of the part that the cashier is in charge of; that is the clerical force.”

“Q. I wish you would just briefly narrate to the jury what the duties of the cashier are in connection with the office.”

“A. Well, I have charge of the office force. Our work is to *collect premiums and transact different matters that come up with policyholders and with our agents.*”

(Tr. p. 89).

“Q. Well, what I am getting at is this: Now if I send you my check in payment of a premium you receive that check tomorrow, you mail that receipt, or do you wait until the check is returned to see whether it

is good or not before you issue the official receipt?" (Tr. p. 90).

"A. No, we don't wait to find out if this check is good before we mail the receipt. If we received a remittance from somebody today we might not get at that maybe until the next day."

"Q. But the general policy is that on receipt of the check the receipt goes forward in acknowledgement thereof?"

"A. Yes; *if the premium is paid within the grace period and is paid in full.*" (Tr. p. 91). The check reached the bank at McMinnville, Oregon, upon which it was drawn on November 20, and was returned to the Portland bank on the 22nd, and on November 25th or 26th it reached appellants Oregon branch office located about 5 blocks from the bank, and was returned by registered letter, of the cashier on that day, addressed to the decedent, McMinnville, Oregon, enclosing the check. (Pl. Ex. 3 Tr. ps. 117 to 119). This letter was not received by Mrs. Miller until the 28th day of November, 1940, the day after, the insured was mortally injured.

On the same day, November 28, Reta D. Miller, wife of the insured obtained a U. S. Money Order, for \$49.07, payable to New York Life Insurance Co. (Pl. Ex. 8c Tr. 127) which according to her understanding

was a compliance with the request of appellant's letter, (Pl. Ex. 3 Tr. 124) returning the unpaid check to cover the amount of the check plus, the interest thereon, and in her own words to make the check good:

"Mr. Neuner. Q. I hand you now Plaintiff's Exhibit 3 and ask you to tell the jury whether or not that was a letter received by you?" "A. Yes, it is."

"Q. Now then, when you stated that you got the money order, what they asked for, what did you mean?"

"A. Well, *I meant I wanted to make the check good.* I immediately got a money order and *paid the check.*"

"Q. And I will ask you to tell the jury whether or not that was in compliance with that letter."

"Mr. Davis: If the Court please——"

"A. That was the way that I read it."

"Mr. Neuner. Q. Yes. In other words, there is where you got the amount, the suggestion for the \$49.07; is that correct?" "A. \$49.07, with interest." "Q. You mailed that when?" "A. November 29th-28th." "Q. The date you received it?" "A. The day I received this I went uptown in the afternoon."

"Q. Now from the time that your husband was injured where was he until the time of his death?"

"A. He was in the General hospital in McMinnville."

"Q. Did you see him during that time?" "A. I

saw him. I didn't talk to him."

"Q. Why?" "A. Well, he was in an unconscious condition and he didn't talk to anyone either——"

"The Court: Injured on the 27th and passed away on what day?" "A. December 3rd."

"Mr. Neuner: The 3rd."

"The Court: December 3rd."

"Mr. Neuner: Q. Now then, that money order was returned to you?" "A. After his death."

At the conclusion of testimony, defendant moved the court to direct the jury to return a verdict in its favor, on the general ground that there was no evidence that the premiums on the policies had been paid when due, or during the grace period, and that there was no evidence binding on defendant of any agreement as to accepting the postdated check as unconditional payment of the premiums.

The court denied the motion and error is assigned.

The Court submitted the case to the jury on two controlling questions of fact, (1) was the check given by Warren L. Miller, insured, on November 13th, 1940, and postdated November 17th, 1940, for \$48.72, accepted by the appellant, as payment of the premiums, on the policies which came due on Oct. 17th, and (2) did the cashier R. A. Durham, in charge of the branch office of the appellant in Portland, Oregon, have au-

thority, to bind the appellant, in accepting the post-dated check as payment.

The jury returned a verdict finding the issues in favor of plaintiffs, declaring both life insurance policies in full force and effect on December 3rd, 1940, the day that the insured died, and fixing the sum of \$1,000.00 as reasonable attorney's fees to be allowed to the appellees.

THE CONTESTED ISSUES

Appellant contends that there are four main contested issues in this case, (1) in the admission of testimony pertaining to acceptance of the check in payment of the premiums, (2) denying appellants motion for a directed verdict, (3) refusal to give appellants requested instructions and, (4) erroneously instructing the jury as to the law.

ERRORS RELIED UPON BY APPELLANT

Appellant's brief, specifies and recites nine specifications or errors (pp. 10-20) Nos. 1 to 5 are considered under one argument (pp. 21-27) and pertain to the introduction of testimony; No. 6 deals with the denial of the motion for a directed verdict; specifications Nos. 6, 7 and 8, criticize the instructions given by the Court and No. 9 alleges error in the Court's refusal to give requested instructions.

ARGUMENT

Appellant's Specifications of Errors 1 to 5

Appellant has chosen to treat its assignments of errors 1 to 5 under one head, but have cited only two authorities in support thereof, one, Sec. 2-226 O. C. L. A. which is but a statement of the basic rule on the admissibility under the state practice, the other reference merely cites 20 Am. Jur. wherein the general rule of the admissibility of evidence is reiterated.

POINTS AND AUTHORITIES

I.

The admissibility of evidence in federal courts is now, and has been for sometime, governed by the federal rules of civil procedure. Rule 43 is as follows:

“(a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.”

The mere fact that given evidence is not admissible under the state practice, will not deny its admissibility in

federal courts.

Aetna Life Ins. Co. vs. McAdoo, 106 F (2d) 618 (1939)

Rule 61, of Federal Rules of Procedure, provides, in substance that error in the admission of evidence shall be disregarded unless such admission is "inconsistent with substantial justice", and errors which do not affect the substantial rights of the party litigant, are to be disregarded.

Appellant has failed to point out, or demonstrate in what manner its substantial rights were affected by the admission of the evidence complained of, and it is clear that there was no error in the introduction of such evidence.

We could well end our answer to the contention on the admissibility of evidence here, but being zealous of the duty we have to perform to our clients, we offer the further authorities for admissibility of such evidence.

In spite of the silence of the appellants, we are concerned with a *postdated check*. The Negotiable Instrument Law, Sec. 12, 69-112 O. C. L. A. provides, that an instrument shall not be invalid for the reason only, that it is antedated or postdated, provided, this is not done for an illegal or fraudulent purpose. It was thus incumbent upon the appellees to prove as a part of their case, that the insured acted in good faith in giving the postdated instrument. The fact that he thought he had sufficient money credited to his account in the bank is evidenced by his notation and subtraction on his check stubs, (Pl. Ex. 6, Tr. p 162) and

this was certainly competent evidence, that he acted in good faith.

The appellant claims error in the admissibility of the check stubs, on the additional ground that it was not shown to have been made "at or about the time of the issuance of the check". The insured's lips are sealed, of course, by death, and Agent Yount, who was the only person present at the time the check was written, testified that the insured "had a check book with him", (Tr. p. 142), but that he didn't know whether the insured made any entries in the stubs (Tr. p. 147). Mrs. Miller testified that the stub's writing was in her husband's hand (Tr. p. 159). When the appellees sought to introduce evidence as to the policy of the insured with reference to keeping his stubs up to date, appellants objected (Tr. p. 157), the appellees did not pursue the inquiry. How, now, can the appellant be heard to object to this evidence on the ground that it was not shown that the entries were made at the time that the check was made, when they objected to the introduction of an evidence as to the manner of making entries, or more properly, the insured's habits with reference thereto? This evidence so offered was the only evidence as to the entries available on the question of good faith. The acts of the appellee, Mrs. Miller, in sending the post office money order was also clearly admissible on that score.

In National Life Co. vs. Brenneke (Ala.) 115 S. W. (2d) 855-860 (1938), the insured had sent the insurer, a

neighbor's check during the last days of the grace period. The company issued an unconditional receipt immediately upon receipt of the check. The check was not paid, returned to the insured together with an application for reinstatement. Upon receipt of this notice, insured sent a money order without the application for reinstatement. The insured then went to a company physician, but his application for reinstatement was rejected. He died four months later. In affirming a judgment for the beneficiary, the court on page 860, held:

"As evidence of good faith, the insured immediately upon notice that the check had been dishonored, he procured and forwarded to the company a post office money order for the amount of the premium."

In the case at bar, the insured was mortally injured when notice came by mail that his check had been dishonored, but did not his widow do the same thing as the insured in the Brenneke case, *supra*?

The doctrine of the Brenneke case has been, and now is the law of Oregon enunciated in the case of Bergman and Berry vs. Twilight, 10 Or. 337, wherein the court held that where good faith of a sale or contract was involved, all that was done by the parties which tends to *illustrate, explain, or elucidate the character of the transaction, is admissible.*

It is appellees position from the time Agent Yount came to the insured's ranch until the time insured died, the transaction was but one, or more legalistically, it was a contin-

uous transaction.

Appellants say:

"If the check was accepted as plaintiffs contend, the act of acceptance was completed when the defendant accepted the check, if it did. Anything that transpired subsequent to the return of the dishonored check to the insured would have no bearing upon the question in dispute". (Tr. p. 27).

It is not pointed out where the line of demarcation is. The appellant introduced its entry made after or simultaneously with the return of the check (Df. Ex. 22, Tr. p. 201). Likewise the appellant introduced in evidence, its check in payment to the bank for the dishonored check (Df. A. Ex. 15, Tr. p. 196) signed by R. A. Durham, "Cashier, Oregon Branch Office".

It is submitted that all of the evidence forming the basis for appellant's assignment of errors Nos. 1 to 5 inclusive, was also admissible as a "part of the res gestae of the transaction."

See Lake County Pine Lbr. Co. v. Underwood Lbr. Co.
140 Or. 19, 12 P. (2d) 324 (1932)

But assuming, that there was error in the admission, it was harmless and cured, by the court's instruction as to the evidence forming the basis for error No. 1, (Br. p. 100) being the testimony of Agent Yount. The court instructed:

"As to the part that Yount played, who picked up the check out at Miller's place, I instruct you, gentlemen, that, what he did could not bind the company. He served, as I view it, as the intermediary whereby Mr.

Miller's check was brought to the company. Only what the company did with the check after it came to the cashier's office could bind the company. * * *. (Tr. p. 229).

The evidence forming the basis for specifications Nos. 2, 3, 4, and 5, (Br. pp. 11 and 12) were referred to by the court in its instructions in the following language:

"Now, as to that payment by her, gentlemen of the jury, that is just one of the later circumstances in this case. That does not bear on the controlling questions in the case" etc. (Tr. p. 230).

We, therefore, submit, that there is no merit in the appellant's specifications of errors Nos. 1 to 5 inclusive.

ARGUMENT

Appellant's Specification of Error 6

In the argument of this assigned error, appellants cited numerous cases under two propositions of its concept of the law governing the cases. Appellees do not agree with its statement of the law, and in support thereof, we attempt to analyze appellant's authorities cited by them. No. 1 on page 28 of its Brief.

The first case, that of Smith vs. Mills, 112 Or. 496, involved the sale of a note and mortgage to the defendant, whose agent was the vice-president of a bank, and who as such vice-president, drew a cashier's check in favor of the plaintiff as consideration for the assignment of the note and mortgage. The bank failed before the plaintiff had an opportunity to present the check. Although the court

cited many cases and discussed the rules of law relating to payment, on page 504, it said:

“We do not find it necessary to reconcile the conflict, nor to announce a rule as to what the presumption of payment is, in cases like those cited by respondent:” etc.

The case turned on the fact that the defendant's agent knew, or should have known, that the check was worthless. At page 507 it said:

“Both parties here are innocent. But it was respondent's agent whose conduct caused the loss. He converted her good money into a bad check, by which to pay her debt. Though innocent herself, she must bear the loss of her agent's dereliction:” etc.

We cannot see wherein this case is applicable to the principle contended for by the appellant. It certainly is no authority in support of any such proposition.

In Johnson vs. Inkovitz, 57 Or. 24 110 Pac 398, was involved no question of insurance, but rather the application of a rule of sales, as to when title passes to goods which are the subject matter of a cash sale. Although the case has no bearing on any of the issues of the instant case, but it may be pointed out that the announcement by the court has been severely criticized.

3 Williston on Contracts (Rev. Ed.) (1936)
See. 732 pp 2079-2082.

Furthermore, this case is of doubtful authority in the light of the Uniform Sales Act. See Sees. 71-118-119 O. C. L. A.

The statement of facts involved in Seaman vs. Muir, 72 Or. 583, 144 Pac. 121, cited by the appellant would only incumber this brief. However, as stated by the court on page 589,

“* * * the whole scheme was an abortive attempt to perpetuate the transaction of the sale (auction of a defunct railroad's assets) until the money should arrive * * *”.

The court did utter a dictum, which is quoted on page 32 of appellant's brief, but as the court said:

“That the notes and cashier's check were not intended as payment of any sum of money to the bank is conclusively shown by the undisputed fact that the bank retained the possession of the check and did not negotiate it.”

Texas Mut. Life Ins. Assoc. vs. Talbert, 134 Tex. 490, 136 S. W. (2d) 584 (1940), although cited by appellant, in support of the proposition that there must be an “agreement to accept the check as unconditional payment” in order to make a check payment of a premium, stated the rule, thus:

“Moreover, this rule (conditional payment by giving of a check where antecedent payment is involved) extends as well to transactions falling within the purview of insurance law, which contemplates that insurance premiums are ordinarily to be paid in cash, and that *in the absence of a definite intention or agreement*, the giving of a check therefore, will not operate as payment.” (Emphasis ours.)

The company in this case was not a legal reserve company, but was an assessment institution, and the basis of

the forfeiture here was the failure to pay an assessment upon the death of one of its members, and an ordinary check was involved.

Appellants next contend that "the burden is upon the person claiming that a check was accepted as payment to prove an agreement to accept the check as payment by clear and satisfactory evidence" (Br. p. 29). Appellees except to this statement of the law in this state. The sole Oregon case cited by the appellant in support of this proposition is Joppa vs. Clark Comm. Co., 132 Or. 21, 281 P. 834 (1929) which involved a check given in payment of a quantity of hogs shipped by the plaintiff to the defendant. The court states the rule as to payment where a debt is involved and concludes at page 27.

"We find no substantial evidence in the record that the check in question was accepted by plaintiff as payment or requiring that issue to be submitted to the jury. Neither the testimony on behalf of defendants nor the circumstances attending the transaction indicates such an agreement, *or to overcome the prima facie presumption that the check was taken merely as conditional, not absolute payment.*" (Emphasis supplied.)

Therefore, the Joppa case does not sustain the appellant's contention. In that case, the court spoke of "presumption of conditional payment" which is something other and different from a requirement that there be an agreement to accept the check as unconditional payment. Likewise, we fail to find a statement in the Joppa case that there must be "clear and satisfactory evidence" in order to establish

payment. It is settled that a mere preponderance of the evidence will satisfy the affirmative of an issue. The Oregon Supreme Court has held that in the case of fraud, that there was no error in instructing a jury that the evidence must be "clear and satisfactory".

Metropolitan Casualty Ins. Co. vs. N. B. Lesher Inc.,
152 Or. 161, 52 P. (2d) 1133 (1935).

As the appellees see it, the Oregon courts have not exacted such a degree of proof in cases not involving fraud, and further in support of this rule, it has been expressly held that it is error to instruct a jury that it is incumbent on a party litigant to establish the fact of payment "by clear and satisfactory evidence", as such an instruction negatives the idea that a mere preponderance is sufficient to warrant a finding of payment.

Meyer vs. Hoffemeister, 119 Wis. 539, 97 N. W. 165,
100, A. S. R. 900.

Turner vs. New York Life Ins. Co. (CCA8) 100 F. (2d) 193, (1938), is also cited and quoted by the appellant. Based upon the facts therein stated, the result is sound. The court could have stated the facts more fully. As appellants point out, the insured utilized the remaining loan value on his policy, and gave the insurer a check for the balance of the premium, stating that he did not have sufficient funds in the bank to meet the check, but that he would have in a few days. The check was dated May 1, and from the statement of facts, it was currently dated. The "loan agree-

ment was forwarded to the New York office for approval" and the check was held until May 7, and then deposited. The check was dishonored and prompt notice was given the insured. The check was again deposited and was again returned, n. s. f. On May 15, it was returned to the insured by registered mail. The insured knew of the letter, but made no attempt to take it out of the post office, or to inquire of the insurer as to its contents. The insured died on June 11. The court stated the rule, as quoted on page 38 of appellant's brief, but it is clear from the following excerpts of the case that the court considered other elements therein in making its decision, for on page 194 thereof, we find:

"The company gave the plaintiff and the insured two opportunities to make good the condition and upon failure so to do, promptly declared a lapse of the policy".

Again on the same page, we further quote:

"* * * the reason the letter did not reach her was because of her own negligence in not calling at the post office for it when she knew that a registered letter from the company awaited her."

Although the identical appellant company was there involved, it cannot be said that the insured in the instant case, or his widow and minor children got the same consideration that the company accorded the insured in the Turner case. As, stated above, we have no quarrel with the Turner case, but the courts holdings and rulings must be considered along with the facts before it. Further, the

fact that the loan agreement was not completed at the time the check was given, would lead to the assumption that the transaction was not to be closed until the 7th of the month, at which time it was contemplated that the loan agreement would have received the approval of the New York office.

In *Central States Life Ins. Co. v. Johnson*, 181 Okla. 367, 73 P. (2d) 1152, the insurer received a check from the insured on the next to the last day of grace, December 15, being the last day. The insured's account was credited and a conditional receipt was issued. The check went through the regular channel, but was dishonored, notice of which was given by the insurer. Insured was notified that he was privileged to seek reinstatement of his policy, which was stated to be lapsed. The insured's application for reinstatement was denied by a letter under date of December 31. He suffered permanent total disability on January 29. The court denied recovery to the insured.

Preceeding the lengthy quotation made on page 39 and 40 of the appellant's brief, the Oklahoma court on page 1154 stated:

"The insurer may ordinarily demand cash in payment of a life premium, in the absence of a contrary intention on the part of the insurer, a personal check does not operate as payment".

The result of that case is sound, when it is taken into consideration that simultaneously with the receipt of the check, the insurer issued a receipt *conditioned upon* prompt

payment of any instrument tendered in payment. Further, an ordinary check was involved. The courts analysis of the law as appears from the quotation made by appellants more nearly approximates the true rule than any of their other cases we have discussed.

Naylor v. Ill. Bankers Life Assur. Co., 134 S. W. (2d) 115, next cited by appellants. This was an action to recover premiums paid to the company on the ground that it had wrongfully declared a forfeiture of the policy. Here again the company issued a conditional receipt simultaneously with a receipt of an ordinary check. It is true, as appellants contend, that the insured upon notification of dishonor of the check, sent a money order to the company, and upon return of the money order, sent a cashier's check, which was also returned. The court in denying recovery, said:

"We think the receipt on its face was notice to appellant that the check was accepted on condition that it be paid when presented to the drawee bank, and was not received and accepted by appellee in payment of the premium".

Hare vs. Connecticut Mut. Life Ins. Co., 114 W. Va. 679, 173 S. E. 772, is next cited by the appellant, but this case is not discussed or quoted in its brief. The Hare case involved a check given to the "local agent" who in turn forwarded it to the general agent. The check was given after the expiration of the grace period. In stating the facts, the court said:

"He immediately wrote to the insured that the check had been protested. The insured did not answer the letter or make the check good."

Great Southern Life Ins. Co. vs. Brooks, 166 Okla. 163, 26 P. (2d) 430, is another case set out in appellant's brief, but not discussed. On July 12, well within the grace period, the insured sent her husband's check for the premium, upon receipt of which, (July 14) the company issued a conditional receipt. Still within the grace period, the insurer notified the insured of the dishonor of the check. The insured did nothing. On August 1, being after the grace period, the insurer wrote sending a health certificate, and requested the insured to apply for reinstatement, and stated the amount necessary to transmit with the application. Some days later, and without replying to this letter, the insured's husband sent a bank draft, but without the health certificate. The insurer acknowledged receipt of the bank draft, and requested the health certificate. No reply was made to the letter. His wife, the insured, had been seriously ill for some weeks. She died August 13. The case, of course, is not in point, on the facts, or on the law.

The case of Philadelphia Ins. Co. vs. Hayworth, 296 F. 339 is relied upon by the appellant, and so is its companion case in 190 N. C. 757, 130 S. E. 612. These cases were likewise the basic authority relied upon by the appellant in the lower court (Tr. p. 253). A close analysis

of the facts is necessary to understand these cases. The policy therein had lapsed for nonpayment of a premium. To reinstate the policy, the insured gave a health certificate, paid \$27.33 in cash, and gave the insurer 3 notes for \$25.00 each, the second of which was due March 24, 1922. The notes contained no grace provision, but on the contrary, contained strong provision for forfeiture. On March 24, the second note became due, and the insurer agreed to extend payment to June 6, (date of the postdated check), upon receipt of another health certificate and a check for \$25.00 postdated June 6. On June 7, the check was deposited, and the note marked paid, and sent to the insured. The check was dishonored, and notice of dishonor was given and of the lapse of the policy.

The essence of the holding of the North Carolina court is illustrated by the following quotation from 130 N. E. at page 613:

“When a note is given for the payment of the premium in a life insurance policy, and the note and the policy contained a stipulation that, upon the failure to pay the note at maturity, the policy shall cease and determine, then a failure so to pay such premium note renders the policy void.”

It is noted that the court here was concerned with whether or not the company had accepted a check in payment of the note. There was no question but that the insurer had accepted the note in payment of the premium, but it must be observed that the note itself contained *a strong forfeit-*

ure provision. The note also contained a provision that *it did not create a personal liability* on the insured; hence it is inapplicable to the facts in the case at bar, and readily distinguishable, and the case rather supports the appellees view than that of the appellant.

APPELLANT'S SPECIFICATIONS 7 AND 8

II

A postdated check is a valid bill of exchange, and is in common use in the business world. It differs from the common check by carrying on its face an implied notice that there is no money presently on deposit to meet it.

Sec. 12, Neg. Instr. Law. Sec. 69-122 O. C. L. A.
 Triphonoff vs. Sweeney, 65 Or. 304, 130 Pac. 979.
 33 Wds. and Phs. (Perm. Ed.) p. 123
 29 Yale Law Journal, 321-325 (1919)
 University of Pittsburg Law Review, Vol. 3, p. 395,
 (1936-1937).

ARGUMENT

The Negotiable Instrument Law, Sec. 69-112 O. C. L. A. is the only section which relates specifically to such an instrument. It provides:

“The instrument is not invalid for the reason only that it is antedated or postdated, provided this is not done for an illegal or fraudulent purpose. The person to whom such an instrument so dated is delivered *acquires the title thereto as of the date of delivery.*”

In that connection we should not lose sight of the fact that under the terms of the insurance policies, the insured, Miller, never promised to pay the premiums, and was not

personally liable for the payment thereof. The premiums due on October 17, 1940, were not debts, nor did they become debts by the terms of the instruments due from the insured to the insurer, *nor was the relationship, between the appellant and the insured, that of creditor and debtor,* but after the insured gave his postdated check in payment of the premiums, he executed a valid bill of exchange, and the *insured became personally liable* to the holder thereof. A new obligation on the part of the insured not theretofore existing, was thereby created. If the check was not paid on presentation, *an action was maintainable* thereon to recover the amount thereof, whereas, *otherwise, no action could have been sustained.*

Under such circumstances, the presumption is that the postdated check was accepted in payment on delivery thereof, in payment of the premiums, by the appellant. In the *case of a creditor and debtor,* the giving of a worthless check can be said to be no payment, *because the creditor receives nothing additional for his debt,* which he did not theretofore have. Or as Williston and other authors say, no merger of a preceding debt into the check should be presumed. *But in the instant case, where no legal obligation existed* on the part of the insured to pay the premiums, the giving of the postdated check *created a valid, legal obligation which the insurer could then enforce.* Or reiterating, there is no debt to merge into the check. It thereby

acquires a right against the insured which it did not theretofore have.

The appellant acquired title to the postdated check as of the date of the delivery, which was on November 13, 1940. In that regard we must bear in mind that we are dealing with negotiable instruments.

“A postdated check or one which bears a date subsequent to that of its actual issue, is payable on or at any time after the day of its date, being in effect the same as if it had not been issued until that date. The rule is laid down in Selover Negotiable Instruments Law, Section 18, that an antedated or postdated instrument may, of course, be negotiable after or before the date given, and any one to whom such an instrument is given acquires title thereto as of the date of delivery.” etc.

Triphonoff v. Sweeney, 65 Or. 304, 130 Pac. 979.

The Triphonoff case is cited as a basis of authority upon the question of a postdated check as a negotiable instrument. This case is freely cited by leading authorities both state and federal, and accepted as the law relating thereto. A “postdated check” has also been defined thus:

“A ‘postdated’ check is one delivered prior to its date, generally payable at sight, or on presentation on or after day of its date, and differs from an ordinary check by carrying on its face implied notice that there is no money presently on deposit available to meet it, but with implied assurance that such funds will exist when the check becomes due.”

33 Wds. & Phs. (Perm. Ed.) p. 123, citing Lovell vs. Eaton, (1925) 133 Atl. 742-3.

In the case of Republic Life Acc. Ins. Co. v. Hatcher, 51

S. W. (2d) 922-933, the court concludes:

"It is proven that the check was accepted by the agent as payment of the premium and the check was paid at the time it was due to an agent having the right to receive the money. *The acceptance of negotiable paper in payment of a premium is binding on the parties*, even though the contract called for a cash payment. New York Life Ins. Co. v. Evans, 136 Ky. 391, 124 S. W. 376; American National Ins Co. v. Brown, 179 Ky. 711, 201 S. W. 326; Kansas City Life Insurance Co. v. Hislip, 154 Okl. 42, 6 P. (2d) 678. *The agent had authority to collect the premium, and the acceptance of a postdated check therefor was within the apparent scope of the agency.* George Washington Life Ins. Co. v. Norcross, 178 Ky. 383, 198 S. W. 1156; Inter Southern Life Ins. Co. v. Duff, 184 Ky. 227, 211 S. W. 738; Henry Clay Fire Ins. Co. v. Grayson County State Bank, 239 Ky. 239, 39 S. W. (2d) 482; Federal Life Ins. Co. v. Warren, 157 Ky. 740, 181 S. W. 331; Globe Mutual L. Ins Co. v. Wolff, 95 U. S. 326, 24 Life Ins. Co. v. Warren, 167 Ky. 740, 181 S. W. 331; L. Ed. 387; Union Mutual Life Lns. Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617."

"It follows that the premium was lawfully paid and the policy was in force when the insured died."

In University of Pittsburg Law Review, Vol. 3, page 359, under the title of "Insurance—Payment of Premium by Postdated check", the author in a well considered and written article, specifically analyzes the case of John Hancock Mut. Life Ins. Co. v. Mann, (CCA7) 86 F. (2d) 783, herein cited, after an exhaustive review of the authorities, sums up and concludes with the following quotation from page 362:

"It is generally held that the acceptance of a nego-

tiable instrument in payment of an antecedent or concurrent indebtedness of *prima facie* only on a conditional payment. The negotiable instrument merges the antecedent or concurrent indebtedness, which will generally be revived upon the dishonor of the negotiable instrument. * * * *But in the case of insurance, there is no antecedent or concurrent indebtedness*, for the insured is not obligated to pay the premium. Consequently, *there is no basis for applying the strict rule of presumption of conditional payment to the payment of insurance premiums.*"

The Negotiable Instrument Law of the State of Oregon defines "acceptance" as follows:

"'Acceptance' means acceptance completed by delivery or notification."

See Sec. 69-1101 O. C. L. A.

Under Section 2-407 O. C. L. A. Certain Disputable Presumptions we find:

"(11) That things in the possession of a person are owned by him."

Johnson v. Apple, 98 Or. 282, 193 Pac. 1024.

The word "acceptance" is defined by Bouviers Law Dictionary (Baldwin's Ed. 1934) as follows:

"The receipt of a thing offered by another with an intention to retain it, indicated by some act sufficient for the purpose. 2 Parsons, Contr. 221."

"IN INSURANCE. Acceptance of abandonment in insurance is in effect an acknowledgement of its sufficiency, and perfects the right of the assured to recover for a total loss if the cause of loss and circumstances have been truly made known. No particular form of acceptance is requisite, and the underwriter is not obliged to say whether he accepts; 2 Phil. Ins. Sec. 1689. An acceptance may be a constructive one, as by taking pos-

session of an abandoned ship to repair it without authority so to do;” etc.

“NEGOTIABLE INSTRUMENT LAW. ‘Acceptance’ means an acceptance completed by delivery or notification. Miller’s Ky. Negotiable Instrument Law, sec. 190.”

Much has been said by the appellant in support of its theory on the question of acceptance, and that there must be a special contract proven by the appellees with reference thereto, but appellees maintain that the appellants cannot in one breath, say that it insisted upon a strict performance of its policy, and in the next breath, permit the insured to believe that the acceptance of the postdated check continued his insurance. Such practice should not be permitted, and as was said by the late Justice McBride, in Francis vs. Mutual Life Ins. Co., 55 Or. 288, 106 Pac. 323:

“It is a practice unworthy of a great business corporation, and is commented upon by Rudkin, J., in Starr v. Mutual Life Ins. Co., 41 Wash. 228 (83 Pac. 117) in terms none too severe.”

There is not a scintilla of evidence in the record, nor can an inference be drawn from any circumstance narrated therein, indicating that the agent intended to accept the check merely conditionally. It is not claimed that at the time the check was received by the cashier of the appellant’s Oregon Branch Office, or from that time, until it was deposited in the bank, that there was anything said, or done, which indicated an intention on the part of the appellant, that the check was not accepted in payment of

the premiums, for the evidence affirmatively shows that no conditional receipt was issued, as was the usual practice, in such cases, at the time of the acceptance of the check (Tr. p. 91), or any notice given him whatsoever, that his policies would lapse, or become void if the check was not paid.

But on the contrary, every act and circumstance of both the Agent Yount, and the appellant's cashier of the Oregon Branch Office, as shown herein, supports the verdict, that the check was received, held and accepted in payment of the premiums.

The soliciting Agent Yount was Miller's boyhood friend and advisor. He called the insured's attention to the payment of the premiums on his policies. It is true Yount had an interest therein, yet he told Miller to "make the check to the company", in the amount which he suggested and designated. Miller did as he was told, and handed the check to Yount, which he then delivered to appellant's cashier, within two hours thereafter, and it was then held by the cashier for five days, or until the following Monday, without returning it, or notifying the insured, that it was accepted conditionally. Please bear in mind that Portland is only about 35 miles from the Miller ranch. These acts and conduct on the part of the insurer, in dealing with the insured, appellees claim waive the provisions of the policies, and at least, extended credit to the insured, a prac-

tice which is universal among insurance companies dealing with its old policy holders, and the insured was honestly led to believe that his policies were in full force, and his insurance continued for his family protection. To conclude otherwise, would again invoke the language of Justice McBride of the Oregon Supreme Court in *Farley v. Western Assurance Co.*, 62 Or. at page 45, wherein the venerable Judge said:

“The defense is unconscionable. Defendant sent its agent out to adjust and settle the loss, and he did settle the amount of it, and agreed that the company should pay it. He was not merely an adjuster or investigator. He had authority to settle as defendant admits. Defendant cannot send out an agent clothed with such authority and trick unsuspecting claimants into a reliance on his representation, and then repudiate them by *attempting to hide behind obscure clauses in the policy.*”

While the appellees do not claim that Agent Yount had authority to accept the check in payment, yet we do claim that Agent Yount called the insured's attention to the policy premiums, received the check, and delivered it to the appellant's cashier in charge of the Oregon Branch Office in Portland, Oregon, and that act, became the act, of the appellant company. To claim otherwise would justify the language above quoted.

The court correctly instructed the jury in submitting the questions of fact, consisting of the two controlling questions, namely: The acceptance of the postdated check in payment of premiums; and, the cashier's authority so to do.

III.

A postdated check, received by an insurer, within the grace period, for the payment of a life insurance premium, which is held by the insurer for a period of five days, without notice to the insured, and until after the period of grace had expired, operates as a payment of the premium.

John Hancock Mut. Life Ins. Co. v. Mann (CCA7)

86 F. (2d) 783

Kansas City Life Ins. Co. v. Davis (CCA9 95 F. (2d) 957

Equitable Life Assur. Soc. v. Brandt, 240 Ala. 260,
134 A. L. R. 555

Olga A. Martin v. New York Life Ins. Co. (N. M.) 234

Pac. 673; 40 A. L. R. 406-423

Williams v. Emp. Liability Assur. Corp. etc (CCA5)

69 F. (2d) 285

ARGUMENT

The appellant company had the right to refuse to accept the postdated check, and insist upon an immediate cash payment within the grace period. It had time to do that from the date, of the delivery of the check, until it was deposited in the bank, a period of five days. It however, remained silent. On the other hand, it had the right to extend credit to the insured, accept the check as a promise to pay the premium, and waive the right of forfeiture. It chose the former, accepted the check which operates as a payment, and impliedly waived, thereby, a forfeiture of the policy.

The case of John Hancock Mut. Life Ins. Co. v. Mann, decided in 1936 by the Circuit Court of Appeals of the

Seventh Circuit, reported in 86 F. (2d) 785, 109 A. L. R. 775, is practically, we believe, on all fours with the case at bar. After citing several authorities, together with decisions of the United States Supreme Court, Circuit Judge Evans, speaking for the court on page 785, states:

“In approaching this question, it is necessary to keep in mind that *the payment of a premium on a life insurance policy is optional with the insured*, who always has the privilege of terminating his insurance by not paying the premium. The consideration of a note by him given for the amount of the premium and the continuance of the life insurance policy. *Inasmuch as the execution of a note creates a liability on the part of the insured which did not previously exist*, it constitutes the consideration for the payment and satisfaction of the premium. Wherein does the execution and acceptance of a postdated check permit of a different conclusion?

“Prior to the issuance of the postdated check there was no liability on the part of the insured to pay the premium. *Upon the delivery of the check there arose a legal liability on his part*. If the check were a presently due check the consideration would arise, but acceptance of such a check would be upon the hypothesis of moneys in the bank with which to pay the check. If there were no funds in the bank, *it would be optional with the insurer to retain the check and enforce the liability or repudiate the effect of its acceptance because of fraud*. For payment of a premium will not be recognized where the insurer was induced to accept something of value upon a showing that the insured practiced fraud and deceit on the party crediting payment of premium.

“*In the execution of a postdated check, however, and its acceptance, there is no fraud or deceit. There is the necessary implication of extension of credit on the part of the payee to the maker of the check*. There

is also the inference that the maker *has no funds in the bank with which to presently meet the sum named in the check, but that he will have the necessary money in the bank on the date of the postdated check.*" (Emphasis ours.)

Again in Kansas City Life Ins. Co. v. Davis, 95 F. (2d) 952-57, Circuit Judge Denman, in a concurring opinion, on page 959, states:

"Unpaid premiums are not debts of the insured. Payment is no more than the performance of a condition precedent to the continuance of the insurance. Hence the insured did not owe the company the \$10.18 on the premiums payable on or before December 1, 1935. If, before January 1, 1936, the company had applied the \$10.18, which it held subject to insured's order, to the premiums due on December 1, 1935, the grace period of 31 days would have extended the policy only to January 1, 1936. * * *

"The letter of January 29, 1936, after the company knew of the dishonored check, states to the insured that the premiums were paid 'to December 1, 1936.' He was therefore entitled to assume from the acceptance of the payment of past premiums after January 1, 1936, of his money, declared by the company to be held theretofore only 'to his order' that the company has waived the nonpayment of the January 1st premium and continued the policy until he had time to repair the 'mistake' of the dishonored check. Since he could assume it from the company's letter, the company is estopped to deny it." (Emphasis ours.)

While perhaps the facts were not analogous to those herein, the principle and rule of law enunciated by him is applicable and applies to the questions involved. The language is plain, clear and convincing, and only reiterates what the courts have universally held, that an insurance

company may waive any condition of a policy inserted therein for its own benefit.

The Equitable Life Assur. Soc. v. Brandt, 240 Ala. 260, we quote from 134 A. L. R. at page 569:

“Whether a transaction constitutes a payment depends upon the mutual intent of the parties manifested to each other. *That intent may be implied from acts and omissions to act.* When one tenders an amount as a payment, the intent of the payee to accept it as such must be inferred from his conduct with respect to it made manifest to the payor. If it is to be held for investigation, or pending the doing of something else, he should notify the payor at once. *If he retains it without expressing any dissent or condition, it will be considered after a reasonable time to have been accepted as tendered.* When that status once occurs *it cannot be altered except by mutual consent.*” (Emphasis supplied.)

Inasmuch as we will quote from Olga A. Martin vs. New York Life Ins. Co., supra, later on, we pass it at this time.

Williams vs. Emp. Liability Assur. Corp. of the Fifth Circuit, 69 F. (2d) 285, Circuit Judge Foster, speaking for the court on page 287, said:

“(3) It cannot be said that on the record the evidence so clearly preponderated in favor of defendant that as a matter of law there was nothing for the jury. There was a conflict in the evidence as to whether Mitchell had agreed *that the check would be held to the 15th* before presentation. *This was a question for the jury.* There is little doubt, if any, that Mitchell had authority to grant his extension or that he had been held out to Williams as having that authority. If he did not have it, *he should have so told Williams* when commu-

nicated with on October 13th. *This was also a question for the jury.*"

IV.

It is a universal rule that courts never favor a forfeiture. This rule applies to the insurer which attempts to escape liability upon the ground of forfeiture for the non payment of life insurance premiums. In such cases, *slight evidence*, will support a finding that a waiver of the right of forfeiture has occurred.

The Knickerbocker Life Ins. Co. v. Phoebe A. Norton
96 U. S. 234 (24 L. Ed. 689)

New York Life Ins. Co. v. Eggleston, 96 U. S. 572 (24
L. Ed. 841)

Lincoln Nat. Life Ins. Co. v. Bastian (CCA4) 31 F.
(2d) 859

Mass. Mut. Life Ins. Co. v. Mayo (CCA9) 81 F. (2d)
661

Mut Life Ins. Co. v. Chattanooga Sav. Bank, 47 Okla.
748, 150 Pac. 190.

ARGUMENT

It is a fundamental rule that courts never favor a forfeiture. This rule applies in a case where an insurer attempts to escape liability upon the theory of a lapsed policy or a forfeiture for non-payment of premiums. In such cases *very slight evidence* will suffice to support a finding that a waiver of a right of forfeiture has occurred.

The cases cited under this head, and other heads, nearly all treat or touch upon the questions ordinarily involved in dealing with insurance premiums, and especially where

postdated checks are concerned, and ever since the case of New York Life Ins. Co. v. Eggleston, *supra*, the courts have universally upheld the doctrine enunciated therein. Mr. Justice Bradley, speaking for the court reiterated the rule expressed in the Norton case, where on page 577, it declared:

“We have recently, in the case of Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234 (24:689), shown that forfeitures are not favored in the law, and that courts are always prompt to seize hold of *any circumstances that indicate an election to waive a forfeiture*, or any agreement to do so on which the party has relied and acted. Any agreement, *declaration, or course of action*, on the *part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture*, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture.”

In the case of Lincoln Nat. Life Ins. Co. v. Bastian, 31 F. (2d) 359, the Fourth Circuit, speaking through District Judge Baker on page 361, quoted from 2 Joyce on Insurance, Sec. 2256, as follows:

“A check, draft or note may be accepted under such circumstances as to clearly indicate that a payment of the premium was effected thereby, at least so as to continue the policy in force and preclude a forfeiture, and this is so held even though *said check, draft or note be not paid when due or be dishonored.*” (Emphasis added.)

and also reiterated the doctrine enunciated in New York Life Ins. Co. v. Eggleston, *supra*.

Likewise, this court, in Mass. Mut. Life Ins. Co. v. Mayo, 81 F. (2d) 661, upheld the doctrine thus enunciated, and that "the company had a right to waive this requirement, notwithstanding the fact that it had a legal defense to the policies."

Appellant Specification of Error 9

Appellant's requested instructions did not state the law applicable to the proven facts, in the case, and the court did not err in refusing to so charge the jury.

V.

The question of acceptance of the postdated check as payment of the insurance premiums, and the authority of the cashier so to do, were questions of fact for the jury to be inferred from circumstances in the case unless only one reasonable inference may be drawn therefrom.

New York Life Ins. Co. v. Lois Rogers (CCA9) 126 F. (2d) 784

Thomas v. Prudential Ins. Co. of America (CCA4)
104 F. (2d) 480

Mass. Trust Co. v. Loon Lake Copper Co., et al (CCA9)
4 F. (2d) 847

Omaha Woodman Life Ins. Co. v. Harry E. Krussman,
etc. No. 10,007 decided October 20, 1942

Hockert v. New York Life Ins. Co. (Iowa) 276 N.
W. 422

ARGUMENT

This court has recently held in New York Life Ins. Co. v. Lois Rogers, 126 F. (2d) 784, that it was for the jury to say whether or not it was the intent of the appellant company, to extend credit to the insured, for the payment

of the first premium, which was to be paid from commissions to be earned by the insured, and whether or not the agent had authority so to do. The court, on page 787, speaking through Mr. Justice Wilbur, said:

“The company could likewise waive the stipulation in the application for insurance that only the president, a vice-president, a secretary or the treasurer of the company had authority to waive any of the company’s rights or requirement, by authorizing other agents to make such waiver, and there was sufficient evidence *to go to the jury as to such waiver*, as above stated.” (Emphasis supplied.)

Mr. Justice Haney, also reiterated the rule and approved it in *Order of United Commercial Travelers v. Campbell*, 115 F. (2d) 743, wherein it was stated in the following language:

“It is the rule that the existence of a waiver depends upon the effect of the insurer’s actions upon the insured, *not upon what the insurer intends*. If the *conduct of the insurer is such as to lead an ordinarily prudent insured person to believe that his protection continues* despite failure to comply strictly with the terms of the contract, the insurer is held to have waived his right to assert a forfeiture * * *” (Emphasis added.)

We believe, that the case of *Hockert v. New York Life Ins. Co.*, 276 N. W. 422, is also applicable, which makes the finding of a jury conclusive and binding upon the court as to any disputed questions of fact, and on page 425, the following language supports that rule:

“The finding of the trial court has the same effect as the verdict of a jury. It found that the check was

accepted in payment. *Its finding cannot be disturbed on appeal unless there was absolute lack of evidence to support it.*"

Again on page 426, the court continues:

"Insurance policies are uniformly, and rightly, construed against the insurer. That should not be interpreted thru the magnifying eye of a technical lawyer. Clearly in this case, the facts show that the New York Life Insurance Company accepted this \$4.56 check in payment of the premium due."

In Martin v. N. Y. Life Ins. Co., 40 A. L. R. 406; 234 Pac. (N. M.) 673, heretofore cited under Points and Authorities III, it was held that where a worthless check is sent by the insured with which to pay a premium due upon a policy it may be accepted by the insurer as payment of such premium, and when so accepted, the right to declare a forfeiture for nonpayment of such premium is waived, even though such check is dishonored by the bank upon which it is drawn and that the delivery of an official receipt by the company acknowledging payment, *casts the burden upon the insurer to show that such check was not received as payment.* The trial Court in that case had granted a motion for a directed verdict, but the Supreme Court held it was a question of fact as to whether the check was accepted in payment *which should have been submitted to the jury and reversed the judgment.*

The appellees herein, in the trial of this case, in the lower court, made a prima facie case of payment, we believe, it then became incumbent upon the appellant to over-

come this *prima facie* case affirmatively, as was said in *New York Life Ins. Co. v. Seifris*, (CCA3), 46 F. (2d) 391, wherein the court approved the following instructions to the jury:

“The burden, as I have said to you, under the facts of this case, due to the acknowledgement of the policy dates, rests with the insurance company to satisfy you by proof that it is clear and convincing that the premium was not paid.”

The cashier for appellant testified that the Oregon Branch Office, in his charge, was in possession of the official receipts. According to both policies (Tr. pp. 20 and 28):

“No person has any authority to collect a premium unless he then holds said official receipt.”

The appellant has seen fit to make possession of the official premium receipts the basis of the agent's authority to collect premiums.

In *New York Life Ins. Co. v. McJunkin*, (Ala.) 149 So. 663. (1933), at page 667, we observe:

“The stipulation for the receipt to be given the applicant was for the benefit of the applicant and may be waived.”

Again in *Bigalke v. Mutual Life* (Mo.) 34 S. W. (2d) 1019, we find on page 1022, the following language:

“Such a provision as this has, in its final analysis, no contractual force or affect whatsoever, *for the instant, an agent who is authorized to do so, accepts the premium without delivery of an official receipt, the provision is waived. * * **”

Mr. Durham testified:

"A. Well, I have charge of the office force. Our work is to collect premiums and transact different matters that come up with policy holders and with our agents." (Tr. p. 89.)

that he endorsed the postdated check for deposit to appellant's account; that he signed appellant's ex. 15p. 196 of the transcript, as, "Cashier of Oregon Branch Office". He also signed the appellant's supersedeas bond, on this appeal, (Tr. p. 69) as "Its Attorney in Fact". That in addition, he was custodian of appellant's official receipt, as aforesaid, which is usually mailed on receipt of checks in payment of premiums. Under these circumstances, can it be logically contended, that he had no authority to accept the postdated check, or to extend credit, in payment of premiums of an old policy holder? Defendant's Exhibit No. 12 (Tr. pp. 185-190) shows that Durham deposited to the credit of appellant's account in United States National Bank on November 18, 1940, checks in payment of premiums aggregating the sum of \$9,734.95, which was on Monday. The previous Saturday, on November 16, 1940, he likewise deposited checks in the sum of \$6,261.37. A branch office doing this large volume of business, can it be said that it was not held out to the insured, and other policy holders, as the agency of the appellant, with full power and authority to transact all business in connection with the payment of premiums, and other matters relating

thereto? Could not the jury under these facts fairly and honestly find that a cashier in charge of such an institution, had authority to accept a postdated check from a good customer, in payment of his insurance premium?

The Oregon law relating to insurance companies and agencies, we will take up under the following.

VI.

The insurance policies or insurance contracts were made in Oregon. The Oregon law is applicable thereto, which we do not believe differs materially from the laws of its sister states of Arizona, Idaho and Washington, which have been interpreted by this court.

New York Life Ins. Co. v. Lois Rogers, *supra*.

Omaha Woodman Life Ins. Co. v. Krussman, et al, *supra*.
Hinkson v. Kansas City Life Ins. Co., 93 Or. 474, 183
Pac 24.

Rosebraugh v. Tigard, et al, 120 Or. 411, 252 Pac. 75.
Northwestern Mut. Life Ins. Co. v. Cohn Bros. (CCA9)
102 F. (2d) 74.
Sec. 101-505 O. C. L. A.

ARGUMENT

The learned Judge in denying the motion for a new trial rendered a supplemental memorandum (Tr. pp. 249-258.) in which he analyzes the facts in the case from his viewpoint, and theory of the case.

Among other things the Court submitted the question of Mr. Durham's authority to bind the appellant company, and also the question of the acceptance of the check to the jury. But complains the appellant:

"In this case, there is no evidence whatsoever that R. A. Durham had any authority to waive the requirements of the policy with respect to payment, or to agree that the company would accept the check as absolute payment of the premium. The evidence is entirely to the contrary and to the effect that he only accepted the check conditional upon its being honored when presented for payment." (Br. p. 54.)

In that regard, the court instructed the jury:

"The defendant claims that Mr. Durham, the cashier, had no authority to accept the check as payment, and I instruct you, gentlemen, that you must find as to that also before the plaintiff is entitled to recover; you must find as to whether Mr. Durham did have authority.

"If you find from all you have heard here that Mr. Durham had authority to bind the company by accepting the check as payment, then the plaintiff would be entitled to your verdict, if the defendant, acting through him, did, in fact, accept it as payment. But should you not find as to any one of those two things, the plaintiffs would not be entitled to recover. Did Mr. Durham have authority to bind the company, to accept the check as payment? Did he, in fact, acting for the company, treat the check as a binding obligation and accept it for the company as payment? I submit both of those questions (105) to you as questions of fact." (Tr. pp. 224-5).

This question involved an agent's authority, and we believe was fairly submitted to the jury by the court. The policies of insurance are Oregon contracts, and under the statutes of the State of Oregon appellant was, as a prerequisite, required to have an agency within the state duly licensed to carry on the business of insurance. Sec. 101-505 O. C. L. A.

The case of Hinkson v. Kansas City Life Ins. Co., 93 Or. 494, 183 Pac. 24, deals with the authority of agents of

life insurance companies, and the payment of premiums. On page 494 the court quotes 2 Joyce on Insurance, (2 Ed.) 439, as follows:

“ ‘Any agent with general or unlimited powers, clothed with an actual or *apparent authorization*, may either orally, or in writing, waive any written or printed condition in the policy, notwithstanding such restrictions.’ ” (Emphasis added.)

It deals also with the ratification of unauthorized acts of the agents. The opinion therein is somewhat voluminous, but we believe when carefully analyzed, it interprets the insurance law with reference to these questions conclusively.

We find that the same court, in Rosebraugh v. Tigard, et al, 120 Or. 411, 252 Pac. 75, again reiterates the question of insurance agent's authorities to bind their principals and quotes the law enunciated by the United States Supreme Court in New York L. Ins. Co. v. Eggleston, supra, on page 422, the court, speaking through Mr. Justice Bean, concerning the authority of a local agent of an insurance company to waive conditions in policies, quotes from 14 R. C. L. Sec. 339:

“ ‘The power of insurance agents to bind their principals is to be determined by the power they are held out by the companies *to the public as possessing*, and not by written instruments of appointment, of which the public could have no knowledge. It is accordingly held that an insurance agent, furnished by his principal with blank applications and with policies, duly signed by the companies officers, and who has been authorized to take risks, to issue policies by simply signing his

name, to collect premiums, and to cancel policies and his knowledge is the knowledge of the insurer, notwithstanding any excess of his actual authority.' ”

Again, on the same page, the court continues:

“While the record may not show that Ryan exercised all the authority mentioned in the foregoing quotation, the rule that his authority is measured by what *he was actually held out to the members as having authority to do is equally applicable to him.*”

It also quotes from the case of Hardwick v. State Ins. Co., 20 Or. 547, 559, 26 Pac. 840, in which Mr. Justice R. S. Bean, writing the opinion, said:

“ ‘Where insurance companies deal with a community through a local agency, *persons having transactions with the company are entitled to assume, in the absence of knowledge as to the agent’s authority,* that the acts and declarations of the agent are as valid as if they proceeded directly from the company (Citing cases) And a person *who is clothed with power to act for them all,* is treated as clothed with authority to bind them as to all matters *within the scope of his real or apparent authority,* and persons dealing with him in that capacity *are not bound to go beyond the apparent authority* conferred upon him and inquire whether in fact he is authorized to do a particular act. It is enough if the act is *within the scope of his apparent authority.* * * This rule proceeds upon the theory that if any party is to suffer by reason of the wrong-doing of such agent, it should be the company who clothed him with apparent authority and for whom he was acting, rather than the assured, *who acted in good faith and innocently became a party to the contract.’ ”*

This is the law of this state. The Hardwick case was cited by the late Chief Justice Taft, while Judge of the Circuit

Court of Appeals, in the case of Greenwich Ins. Co. v. Waterman, 54 Fed. 839, 842.

The Oregon statutes relating to insurance companies, and authorities of agents, are ably commented upon, and analyzed by Circuit Judge Denman of this court, in Northwestern Mutual Life Ins. Co. v. Cohn Bros., 102 F. (2d) 74, which we will not set out here, as this involves several of the propositions that we have already discussed.

Appellant requested the court to instruct the jury (Br. p. 56):

“You are instructed that ordinarily a check is not unconditional payment, but such payment is conditioned upon the check being honored when presented for payment, and in the absence of an agreement between the insured and the defendant to accept said check as unconditional payment the check does not constitute payment unless honored when presented for payment.”

The above request was fully covered by the following instruction given by the court:

“Ordinarily a check is given and accepted in business transaction *conditional on its being paid*; it is not payment as such; but in this case I submit to you as a question for your determination, under the facts of this case, *the check being dated a few days later than it was written, and under all the other facts in the case, whether there was a different intention on the part of both parties in this case*, and in view of your own business transactions where, as I say, a check is given and taken conditional on payment when it is presented. The plaintiff has the burden of proof as to that question. *She must satisfy you, by a preponderance of the evi-*

dence, to be entitled to your verdict, which means a greater weight of the evidence, that the check was given and accepted as payment of the premium, to be entitled to your verdict; and unless you are so satisfied by a preponderance of the evidence *as to the intention of the parties—that means both parties—then your verdict must be for the defendant.*" (Tr. p. 222.)

The court further instructed the jury, as follows:

"But that would not be enough to entitle the plaintiff to recover. You must consider also the defendant's point of view. *There must be a meeting of the minds,* as Mr. Davis said, *before the plaintiff would be entitled to recover. Did the defendant treat the transaction the same way?—Under all the circumstances of the case,* did they treat this check differently than the ordinary check, which, as I say, is given and taken conditional on its payment? When they laid the check aside, as apparently they did for a few days, and thereafter put it through for deposit on the next business day after its due date, *was it the intention of the defendant in thus dealing with the check treat that as payment;* by that I mean to treat that as a binding obligation given to them by Mr. Miller, which they could enforce in the way that all obligations are enforced? If both the giver of the check intended it to be as payment and intended to create a binding obligation on him, and if the receiver of the check, the defendant, treated the transaction the same way, that the check was a binding obligation and could be enforced, and there was a meeting of the minds on that, then that would be payment by the check and that would entitle the plaintiffs to recover in this case, should you so find from a preponderance of the evidence." (Tr. pp. 223-224.)

The court correctly instructed the jury that there must be a "Meeting of minds", which could only be interpreted to mean one thing, and that is, that the appellant and the insured understood each other, and this may be inferred

from the proven acts and circumstances in the case. The verdict of the jury found, that there was a meeting of minds, and set the matter at rest.

We again refer to Equitable L. Assur. Soc. v. Brandt, 240 Ala. 260, 198 So. 595, 134 A. L. R. 555. While this case was reversed upon other grounds, nevertheless, we believe that the reasoning in the opinion clearly sustains the conclusion reached in the instant case. We quote from page 569:

“The mutual assent must be manifested by each party to the other, and except as so manifested it is unimportant. Secret intent is immaterial, only overt acts are considered in determining such assent. The fundamental basis of a contract at common law is reliance on an outward act constituting a promise. *Assent need not be expressed in words. But both acts and words have the meaning which a reasonable person would put upon them in view of the circumstances known to them.* Any conduct of one party from which the other may reasonably draw the inference of a promise is effective in law as such. See the discussion in 1 Williston on Contracts, Revised Edition, sections 22 and 22-A, pages 41 to 44.”

Again on the same page, we continue in the following language:

“Whether the payee acted with due diligence and in a reasonable time to notify the payor *is a question of fact for the jury to be inferred from the circumstances,* except where only one reasonable inference may be drawn from them.”

Concluding on page 570, we find this significant language:

"The question of whether insured had a right to believe and did believe as a reasonable man that his check of January 28, 1936, had been accepted by the insurer *in the absence of any notice to him* whatever in respect to it until he died on February 3, 1936, is not one of law, *but an inference of fact for the jury*. The affirmative charge should not have been given as to it for the plaintiff, nor the defendant either. We will not examine closely the rulings of the court in this respect."

A perusal of the requested instructions of the appellant herein, together with the instructions given by the court, will convince the most skeptical, that the law applicable to the proven facts was clearly given in the charge to the jury. The appellees' theory, and their contentions were restricted, and the charge is much more favorable to the appellant than it had a right to expect, under the circumstances and facts. The court applied the law applicable thereto, and we maintain that there was no error.

The question of the motion for a directed verdict and the motion for a new trial are covered under our other points and authorities. We feel that it would unduly extend these pages if we discussed these matters in greater detail.

VII.

Under the statutes of Oregon, appellees are entitled, when a case is appealed to the Supreme Court, and the judgment is affirmed, an additional attorney fees.

Sec. 101-134 O. C. L. A.

Purcell v. Wash. Fid. Nat. Ins. Co., 146 Or. 475, 30 P (2d) 742

State ex rel v. Employees' Hospital Ass'n, 157 Or. 618, 73 P (2d) 793

Horwitz v. New York Life Ins. Co. (CCA9) 80 F. 295

ARGUMENT

Appelles alleged in their complaint that the sum of \$1,500.00 was a reasonable sum to be allowed the plaintiffs as attorney fees, in their first cause of action, and that \$1,000.00 was a reasonable sum to be allowed plaintiffs as attorney fees under their second cause of action. (Tr. pp. 8 and 12.) The jury in the court below allowed the sum of \$1,000.00 which was entered as a part of the judgment therein.

Section 101-134 O. C. L. A., among other things, provides:

"If attorney fees are allowed as herein provided, and on appeal to the Supreme Court by the defendant, the judgment is affirmed, the Supreme Court shall allow to the respondent such additional sum as the court shall adjudge reasonable as attorney fees of the respondent on such appeal."

This provision has been interpreted by this court in Horwitz v. New York Life Ins. Co., *supra*, wherein this court held in passing upon this question, Mr. Justice Denman, speaking on page 302:

"The rules of the district court adopted the law of Oregon with reference to court costs. Such a provision of the Oregon law, by way of costs, is an incident of the remedy and is controlled by the law of the forum.

(Omitting citations.) The insured is entitled to a decree for an amount of attorney fees to be fixed by this court which has finally treated the issues."

CONCLUSION

The appellees respectfully conclude that the trial court, did not err in admitting the testimony over the appellant's objection. That it fairly and correctly submitted the questions of fact involved to the jury, and that the evidence sustains the verdict of the jury, which sets the matter at rest, and appellees maintain that the judgment of the district court should be affirmed. That they be allowed such sum as the court may adjudge reasonable as attorney fees herein.

Respectfully submitted,

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In the United States
Circuit Court of Appeals
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant

vs.

RETA D. MILLER and WARREN D. MILLER,
MARCIA M. MILLER, Minors, by Reta D. Miller,
Guardian,

Appellees

Appellant's Reply Brief

Upon Appeal from the District Court of the United
States for the District of Oregon

HON. CLAUDE MCCOLLOCH, Judge

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FILED

JAN 13 1943

PAUL P. O'BRIEN,
CLERK



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In the United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE
COMPANY, a corporation,

Appellant

vs.

RETA D. MILLER and WARREN
D. MILLER, MARCIA M. MILLER,
Minors, by Reta D. Miller, Guardian,

Appellees

No. 10258

Appellant's Reply Brief

Upon Appeal from the District Court of the United
States for the District of Oregon

HON. CLAUDE McCOLLOCH, Judge

STATEMENT

Appellants in this Reply Brief will endeavor to
arrange its argument to coincide with the arrangement
used by appellees in their brief. Apparently ap-

peltees have arranged their argument under the Specifications of Error and also under different points. Appellant has endeavored to reply to the various points raised by appellees under the Specifications of Error as near as practicable, and where not practicable has designated the argument under appellees' points.

SPECIFICATIONS OF ERROR 1 TO 5

ARGUMENT

Appellees' argument under the above specifications of error is to the effect that it was incumbent on the appellees to prove that the insured acted in good faith and it was therefore competent to show that the entries on the check stub (Pl. Ex. 6, Tr. Pages 160-162), and also competent for Mrs. Miller to testify (Tr. Pages 152-156) that she mailed a money order to appellant after the check had been returned because of its dishonor, in order for her to show good faith. Appellees then argue that even if it was error to receive the evidence it was harmless and was cured by the Court's instructions.

In the first place, there never was any issue in this case with reference to the good faith of the insured in giving his check in payment of the premiums in question. The one and only question in the case is whether

the premiums in question were paid. If they were paid it was because as appellees contended the check dated November 17, 1940, was given by the insured and accepted by the appellant as unconditional payment of the premiums in question (Pre-trial Order, Tr. Pages 44-48). The check stub (Pl. Ex. 6), the money order (Pl. Ex. 8c), the letter returning the money order (Pl. Ex. 8a), and the testimony of Mrs. Miller with reference to the money order had absolutely no bearing on the question of the acceptance of the check as unconditional payment.

It makes no difference whether the evidence question is to be determined by the Oregon Statutes or the Federal Rules of Procedure as in neither case would irrelevant and immaterial evidence be admissible.

Appellees have not argued that the agent Yount had any authority to bind appellant and have made no effort to justify the admission of the evidence objected to under Specification of Error 1.

It is appellant's contention that the admission of the evidence under Specifications of Error 1 to 5 constituted error. The reception of such evidence as this cannot be cured by an instruction of the Court. In other words, you cannot unring a bell. When this evidence was received it made its impression on the jury and this impression could not be and was not erased by an instruction to disregard it.

SPECIFICATIONS OF ERROR 6, 7 AND 8

ARGUMENT

Appellees have not cited any additional authorities under Specification of Error 6 but have discussed the authorities cited by appellant under that specification. Appellees' argument under Specifications of Error 7 and 8 pertains to the matters considered under Specification of Error 6, so reference to all three will be made under this heading.

As appellant understands appellees' argument under Specifications of Error 7 and 8 it is substantially as follows: (1) There was no liability on the part of the insured to pay the premiums, but when he gave his check (post dated as claimed by appellees) he became personally liable on the check and a new obligation arose. (2) Under such circumstances the presumption is that the check was accepted as payment on delivery thereof.

To sustain this argument appellees have cited the negotiable instruments law and cases dealing with that law. It should be pointed out here that there is no question in this case with reference to the negotiable instrument law. The question is not whether the check was accepted but whether it was accepted as condi-

tional or unconditional payment. It is appellant's contention that the burden was upon appellees to prove that the check was accepted as unconditional payment, and the cases cited by appellant in its brief are to that effect. Apparently appellees recognize this rule as applied to a check presently dated but argue that where there is a post dated check the rule is different because the giving of a post dated check creates a valid legal obligation which the insurer could enforce.

Appellees have placed emphasis on the fact that the check in the instant case was dated subsequent to the date on which the insured gave the check to the agent. They argue that it is therefore a post dated check. Appellees do not point out, however, that the check was dated within the grace period provided in the policies. Appellees argue that the acceptance of a post dated check has the effect to extend credit. If credit was extended it would have to be for a period subsequent to the expiration of the grace period. Where the check is dated within the grace period there can be no extension of credit to the date of the check, because as a matter of right the insured under the terms of the policies had all of that time within which to pay the premiums. The situation is the same as if the insured had come in on the last day of grace and gave a presently due check in payment.

The case of *Republic Life Acc. Ins. Co. v. Hatcher*, 244 Ky. 574; 51 S.W. (2d) 922, cited by appellees is not in point. That case involves a first premium paid to an authorized agent and accepted by the agent as payment of the premium. The agent remitted to the company. The check was not dishonored when presented for payment.

On Page 32 of their brief appellees state as a proposition of law:

"A post dated check, received by an insurer, within the grace period, for the payment of a life insurance premium, which is held by the insurer for a period of five days, without notice to the insured, and until after the period of grace had expired, operates as a payment of the premium."

This proposition, even if true, could not be applicable to the instant case because even though the Miller check was received within the grace period it was not dated subsequent to the grace period and was not held until after the expiration of the grace period. The check was deposited by appellant on the last day of grace.

The principal case relied upon by appellees is *John Hancock Mutual Life Insurance Co. v. Mann*, C. C. A. 7th Circuit; 86 Fed. (2d) 783. That case, instead of being on all fours with the instant case, as claimed by appellees, is easily distinguished. In that case the

insured was dealing with the general agents of the insurer, who upon receipt of the check notified the home office of the payment without specifying the manner of payment. Furthermore, the check was dated after the expiration of the grace period and it was payable to the insurer's general agents and not to the company. The case is not in point because (1) The check in the instant case was not dated after the expiration of the grace period; (2) There is a limitation of authority in the policies in the instant case not present in that case, and (3) There was no conduct in the instant case indicating an acceptance of the check as unconditional payment. On the contrary, the conditions contained in the official receipts clearly demonstrated that the check was accepted as conditional payment.

Equitable Life Assurance Society v. Brandt, 240 Ala. 260; 198 So. 595; 134 A. L. R. 555, is not a case dealing with the question of the payment of premiums with a worthless check. That case is concerned with the question of a remittance pursuant to letters from the insurer where there had been a lapse of a policy. It was held that under the peculiar circumstances of that case it was a question for the jury whether the insurer had accepted the check. Those circumstances or similar circumstances are not present in the instant case.

The case of *Olga A. Martin v. New York Life Insurance Co.*, 30 N. M. 400; 234 Pac. 673; 40 A. L. R. 406, cited by appellees, recognizes the rule contended for by appellant when the Court in its opinion says:

"In connection with this subject, we think the mere delivery to the insurer of a worthless check or bank draft, which is dishonored when presented for payment, in the absence of any fact or circumstance indicating an agreement on the part of the insurer to accept it as payment of the premium then due, does not operate to waive the right of forfeiture upon its nonpayment, as the general rule of commercial transactions is that the receipt of such check or draft is predicated upon the implied understanding that it will be paid."

In the case of *Williams v. Employers' Liability Assurance Corporation*, C. C. A. 5th Circuit, 69 Fed. (2d) 285, cited by appellees, the insured was dealing with an agent who had authority to extend credit and who did extend credit to the insured. There was a question as to how long he had extended credit and the Court held that under the facts of the case it was a question for the jury. The facts of that case are not even similar to the facts of this case.

Appellees argue that forfeitures are not favored in law. Appellant does not argue against that proposition, but it is likewise true that if a forfeiture has occurred the Courts will recognize and enforce it. Before a for-

feiture can be waived there must be some definite action on the part of the insurer indicating an intention to waive the same. There was no such action in this case. The insured was not lead to believe that his policy would be in force beyond the grace period if his check was not honored. It would take a strong imagination to say that the insured ever intended that the company would accept his check in any other manner than the ordinary transaction, or that he ever believed that his insurance would be in force if the check was not honored. There certainly was no action on the part of appellant that would justify such a belief even if he did have it.

In the case of *Lincoln National Life Insurance Co. v. Bastian*, 31 Fed. (2d) 859, C. C. A. 4th Circuit, cited by appellees, the court in its opinion quotes from *Veal v. Security Mutual Life Insurance Co.*, 6 Ga. App. 721; 65 S. E. 714, as follows:

“If the holder of a policy of life insurance sends to the company on the day the premium is due a check in payment thereof, and when the check is presented at bank, payment is refused because of lack of funds to the credit of the drawer, the company, although it has delivered the premium receipt to the insured, may, by taking proper steps, repudiate the transaction for the legal fraud resulting from the insured’s having sent a check without having in bank the funds to meet it, and may

enforce a lapse of the policy for non-payment of premium. But if the company, in such a case, after notice that the check had been dishonored, retains it, and instead of repudiating the transaction by returning the check and demanding back its receipt, insisted upon the insured's paying it after the date on which the policy would otherwise have lapsed, a waiver of the punctual payment of the premium in cash results. If the insurance company accepts and retains a note, check, or other interest-bearing obligation for the premium, the policy will not be held to be lapsed or forfeited for non-payment of premium, even though the note or other obligation is not paid at maturity."

In the instant case appellant did exactly the things indicated by the Georgia court to be sufficient to enforce a lapse of the policies.

It is appellant's contention that payment of the premiums in question was not affected by the mere giving of the check, but it was conditioned upon the check being honored when presented for payment in the absence of an agreement to accept the check as unconditional payment. The Oregon Supreme Court in *Smith v. Mills*, 112 Ore. 496; 230 Pac. 350, held that in order that the acceptance of a cashier's check should constitute payment the transfer must be by an agreement of the parties with that understanding. In *Seaman v. Muir*, 72 Ore. 583; 144 Pac. 121, it held that the execution and delivery of negotiable paper is not pay-

ment unless the same is accepted by the parties in that sense, and in *Joppa v. Clark Commission Co.*, 132 Ore. 21; 281 Pac. 834, it held that a promissory note does not discharge an obligation in the absence of an agreement to that effect, and that when a debtor gives his check the *prima facie* presumption arises that the check is taken merely as conditional, not absolute payment, and if there is an agreement to the contrary it must be proved by clear and satisfactory evidence.

In the instant case there is absolutely no evidence that the check in question was either given or received in any other manner than in the ordinary transaction. Furthermore, the conditional receipts mailed out by appellant clearly demonstrated that the check was received conditionally and not unconditionally.

APPELLEES' POINT V

ARGUMENT

On Page 38 of their brief appellees state a point as follows:

"The question of acceptance of the post dated check as payment of the insurance premiums, and the authority of the cashier so to do, were questions of fact for the jury to be inferred from circumstances in the case unless only one reasonable inference may be drawn therefrom."

An examination of the authorities cited under the point fails to disclose a single one of them that states or approves the point stated.

The quotations in the appellees' brief from the cases of *New York Life Insurance Company v. Lois Rogers*, 126 Fed. (2d) 784, and *Order of United Commercial Travelers v. Campbell*, 115 Fed. (2d) 743, have to do with waiver. Appellant does not argue that it could not waive a forfeiture or any of its rights or requirements. The waiver must be made, however, by an authorized person and there must be evidence of such waiver. In the instant case there is absolutely no evidence of waiver and there is no evidence that any of the persons dealing with the premiums in question had any authority to waive any of the company's rights or requirements with respect to payment.

The case of *Hockert v. New York Life Insurance Co.*, (Iowa) 276 N. W. 422, cited by appellees, is not applicable. In that case the insured sent a check together with a blue note in response to a letter directed to him stating in effect that if he mailed the blue note and his remittance by a certain date the premium payment would be extended. The Court was of the opinion that the insured did exactly what he was requested to do. It held that this circumstance, together with other circumstances, was sufficient to sustain a finding that the blue note and the check had been accepted and treated as cash. Those facts are not present in the instant case.

In the case of *Martin v. New York Life Insurance Co.*, 30 N. M. 400; 234 Pac. 673; 40 A. L. R. 406, cited by appellees, it should be noted that the receipt which was forwarded to the insured did not contain the conditions contained in the receipts in the instant case. In the Martin case the Court felt that the sending of the official receipt without the conditional limitation indicated that the company received the check as payment, so that the burden would rest upon it to show otherwise. The distinction between that situation and the situation where the receipt contains the conditions as in the instant case is brought out in *Central States Life Insurance Co. v. Johnson*, 181 Okla. 367; 73 Pac. (2d) 1152, which refers to the Martin case and distinguishes it.

The case of *New York Life Insurance Co. v. Seifris*, C. C. A. 3rd Circuit, 46 Fed. (2d) 391, cited by appellees, concerns the payment of the first premium on a policy in the hands of the insured which recited that the premium had been paid. In such a case the Court held that the burden rested with the company to show that the premium was not paid. That is quite different from this case.

APPELLEES' POINT VI

ARGUMENT

Appellees in their brief (Page 43) refer to the Supplemental Memorandum prepared by the Honorable Claude McColloch, dated October 15, 1942. This memorandum was prepared after the appeal in this case and after the transcript of the record had been forwarded to the clerk for printing. It was, therefore, not included in the stipulation with reference to the contents of the record on appeal to be printed.

In the Supplemental Memorandum (Tr. Page 251) the Court stated that "counsel for the company with commendable frankness defended the case on the basis that the acceptance of the post dated check put the company on the same footing as if it had taken a promissory note."

Judge McColloch apparently inadvertently misconstrued the position of the defendant. The defendant did not take that position, at least did not intend to do so, in the trial court. The position taken by the defendant in the trial court is the exact position taken by it in this court. There was some discussion before the court with respect to whether a post dated check would be the same as a promissory note, and the de-

fendant took the position that even if it were a promissory note it would make no difference as under the Oregon cases the acceptance of a promissory note would not constitute unconditional payment in the absence of an agreement to that effect.

Appellant agrees that the insurance policies involved herein were delivered in Oregon and that the Oregon law applies. That is the reason that the appellant cited the cases of the Oregon Supreme Court with respect to the effect of giving a check or promissory note as payment, and which hold that before a check or note can be said to be received as absolute payment or unconditional payment an agreement to that effect must be shown by clear and satisfactory evidence.

The Oregon cases cited by appellees with respect to the authority of an agent are not contrary to appellant's contention. Appellees have failed to show how these cases benefit them as applied to the facts of this case. The Oregon cases uphold appellant's contention that there must be evidence of waiver by an authorized agent. There was no evidence in this case of waiver or of any authority of an agent to waive, or that the company held out any agent as having such authority. To the contrary, the policies provided for payment in cash and expressly provided that no agent was authorized to make or modify the contract or to extend the

time for the payment of premiums or to waive any lapse or forfeiture of any of the company's rights or requirements. The applications which were made a part of the policies and constituted a part of the contract provided that only the President, a Vice-President, a Secretary or the Treasurer of the company could make, modify or discharge contracts or waive any of the company's rights or requirements. These were not secret instructions but instructions that were printed in the policies which the insured had in his possession. As stated in *Bartnick v. Mutual Life Insurance Company of New York*, 154 Ore. 446; 60 Pac. (2d) 943, the insured was bound to know the terms of his policies.

APPELLEES' POINT VII

ARGUMENT

Appellees have asked this court to affirm the trial court's judgment and allow appellees an additional attorneys' fee in this court citing as their authority Section 101-134 *O. C. L. A.*, and *Horowitz v. New York Life Insurance Co.*, 80 Fed. (2d) 295.

Section 101-134 *O. C. L. A.* provides as follows:

"Whenever any suit or action is brought in any court of this state upon any policy of insurance of any kind or nature whatsoever * * * * * the plaintiff in addition to the amount which he may

recover shall also be allowed and shall recover, as part of said judgment such sum as the court or jury may adjudge to be reasonable as attorneys' fees in said suit or action; * * * * *. If attorneys' fees are allowed as herein provided and on appeal to the Supreme Court by the defendant the judgment is affirmed the Supreme Court shall allow to the respondent such additional sum as the court shall adjudge reasonable as attorneys' fees of the respondent on such appeal * * * * *."

The case of *Horowitz v. New York Life Insurance Co. Supra*, was a case in which the defendant secured a decree in the trial court which was reversed by this court. This court dealing with the forepart of the above statute held that the insured was entitled to attorney's fees and fixed attorney's fees to be allowed in the judgment to be entered in the trial court in favor of the plaintiff.

This court in *American Surety Company of New York v. Fischer Warehouse Co., et al*, 88 Fed. (2d) 536, on the basis of the latter part of the Oregon statute allowed an additional attorneys' fee on appeal where the judgment of the trial court was affirmed. The court cited as its authority *Horowitz v. New York Life Insurance Co. Supra*.

Appellant does not agree that this court has authority to grant additional attorney's fees in the event it should affirm the judgment of the trial court. The Court's attention is called to the Oregon statute, the forepart of which provides for attorneys' fees whenever

any suit or action is brought in any court of the state. That wording is broad enough to include the Federal District Court. The latter part of the statute, however, provides for attorneys' fees on an appeal to the Supreme Court, meaning the Oregon Supreme Court. The wording of the latter part of the statute is not broad enough to include the Circuit Court of Appeals.

Appellant is of the opinion that in the event this court affirms the trial court then it should further consider the Oregon statute with reference to attorneys' fees and reverse its decision in *American Surety Co. of New York v. Fischer Warehouse Co., et al, Supra*.

CONCLUSION

The evidence admitted over appellant's objection and referred to under Specifications of Error 1 to 5 inclusive was irrelevant and immaterial to the issues in the case and served to create prejudice against appellant before the jury. The reception of this evidence constituted reversible error.

The evidence in the case failed to show that the premiums due on the policies on October 17, 1940, were paid when due or within the grace period. The evidence failed to show any agreement between the insured and appellant that the check dated November 17, 1940, was accepted as unconditional payment. There being no

such evidence it must be presumed that the check was received as conditional payment. The check was dishonored when presented for payment. Consequently, the premiums were not paid and the policies lapsed according to their terms and were not in force on the date of death of the insured. The trial court should therefore have directed a verdict in favor of appellant.

The instructions of the trial court to the jury did not fairly present the case to the jury. Appellant objected to the court's instructions and these objections were overruled. This also constituted reversible error.

It is appellant's opinion that this court should reverse the trial court and direct that judgment be entered in favor of appellant on both causes of action. If the court is of the opinion that appellant was not entitled to a directed verdict then the court should reverse the trial court and direct that a new trial be had in view of the errors of the trial court in admitting prejudicial testimony on irrelevant and immaterial matters, and also because of errors in instructions to the jury.

Respectfully submitted,

HUNTINGTON, WILSON & DAVIS

W. M. HUNTINGTON

ROLAND DAVIS

Attorneys for Appellant

514 Porter Building
Portland, Oregon

In the United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant

vs.

RETA D. MILLER and WARREN D. MILLER,
MARCIA M. MILLER, Minors, by Reta D. Miller,
Guardian,

Appellees

Upon Appeal from the District Court of the United
States for the District of Oregon

HON. CLAUDE McCOLLOCH, Judge

Petition of Appellant for Rehearing

HUNTINGTON, WILSON & DAVIS

W. M. HUNTINGTON,

ROLAND DAVIS,

514 Porter Building
Portland, Oregon

Attorneys for Appellant.

FILED

MAY 23 1943

PAUL F. O'BRIEN,
CLERK



In the United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant

vs.

RETA D. MILLER and WARREN D. MILLER,
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Upon Appeal from the District Court of the United
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HON. CLAUDE McCOLLOCH, Judge

Petition of Appellant for Rehearing

HUNTINGTON, WILSON & DAVIS

W. M. HUNTINGTON,

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514 Porter Building

Portland, Oregon

Attorneys for Appellant.

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

NEW YORK LIFE INSURANCE
COMPANY, a corporation,

Appellant

vs.

RETA D. MILLER and WARREN
D. MILLER, MARCIA M. MILLER,
Minors, by Reta D. Miller, Guardian,

Appellees

No. 10258

Upon Appeal from the District Court of the United
States for the District of Oregon

HON. CLAUDE McCOLLOCH, Judge

Petition of Appellant for Rehearing

Comes now the appellant and petitions the Court
to grant a rehearing in the above entitled cause.

This petition is based upon the following grounds:

I.

Error of the Court in holding that the action of appellant in holding the dishonored check at its Portland branch office for a day before returning it to the insured furnished a sufficient rational basis for the jury's verdict.

It appears from a study of the majority opinion that the basis for the decision is that appellant held the dishonored check in the Portland office for one day before returning it to the maker and that "no explanation was offered for this delay." This view as to the basis of the majority opinion is borne out by the dissenting opinion of Justice Haney.

Appellant respectfully submits that the majority opinion on this point is in error in two vital particulars:

(1) It apparently holds that the incident of holding the check overnight bears on the question of whether appellant had previously agreed to accept the check unconditionally. We contend it has no probative value on this question because it occurred *after* any alleged agreement could have been made. On the record the rights of the parties were fixed when the check was dishonored at the McMinnville bank—not when the dishonored check was returned to Portland—not when the Portland branch office returned the same by mail to the insured.

(2) The Court is in error in holding that the appellant's alleged unexplained "delay" in keeping the dishonored check overnight furnished a rational basis for the verdict. It is appellant's earnest contention that if there were any requirement for the prompt return of the dishonored check to insured, certainly this was complied with when the check was mailed during the next business day after the receipt thereof; that appellant was entitled to a reasonable time for getting the check through its Portland office and into the mail to insured. There was no delay and therefore no explanation by appellant was required.

Under Section 69-1003, O.C.L.A. a check must be presented for payment within a reasonable time after it is issued or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay. It would seem that this Court should not hold that the payee of a dishonored check owes to the maker a greater obligation for its prompt return than he owes to the maker of a good check for its prompt presentation. The rule in Oregon with respect to a reasonable time under Section 69-1003 O.C.L.A. is that a check should be presented, where drawee and payee are in the same place, at some time before the close of banking hours on the day after it is received by the payee. *Loland vs. Nelson*, 139 Ore., 581, 584; 8 Pac. 2nd, 82. Williston on Contracts (Revised Edition), Sec. 1209, p. 3470,

states: "and if the drawee bank is not in the same place the check must be sent for collection on the day following receipt."

In this case the dishonored check was returned to appellant on Monday, November 25, and on November 26 the cashier sent it by registered mail to the insured at McMinnville, Oregon (plaintiff's Exhibit 3, Tr. p. 117). This action therefore was taken within the same time that is required for the presentation of a good check. As this Court knows, the business of a life insurance company must be transacted meticulously and with a full written record evidencing each transaction. The Court recognizes that the Portland agency of appellant was an important state office. The record shows, as the minority opinion indicates, that there was a large volume of business transacted in this office. We believe it will be conceded that all transactions involving the receipt of checks, the deposit thereof, the reversing of entries in the event of dishonor and the return of dishonored checks must be carefully recorded. This was done in the present case. (See defendant's Exhibits 21, 10, 11, 12, 15, 22 and plaintiff's Exhibits 3, 3a; Tr. pp. 200, 182, 183, 185, 196, 201, 117, 122). The Court must know that such procedure is followed by business concerns generally because checks are universally used. Certainly this Court should not go on record with a decision, the effect of which will be to place every business

concern in a position where it must, in the event a check is dishonored, immediately cease its routine business procedure, go to the maker of the check, give him an opportunity to correct a situation which has arisen through his own act or omission and through no act of the payee, and in the meantime hold open to the party at fault all his former rights and privileges. Business cannot be conducted in this way. If the rule announced by the Court is to stand business concerns cannot, in cases where the time element is important, accept or handle personal checks under any conditions.

II.

Error of the Court in holding that there was substantial evidence in the case to support the finding of the jury that the check was given and received as unconditional payment of the premiums.

The only incidents mentioned in the Court's opinion, other than the holding of the check overnight (discussed above) are analyzed below and we respectfully submit that none constitutes evidence worthy of submission to a jury.

(1) The Court indicated that the giving of the check by the insured was evidence of his intention to become bound. We think this was evidence of an intention to pay the premiums and nothing more. But always the

presumption is that the check is given conditionally. As stated in Central States Life Insurance Co. vs. Johnson, 181 Okla. 367; 73 Pac. 2nd, 1152, 1154,

"A check is never presumed to constitute payment of obligation. The presumption is that it is accepted only conditionally upon its due payment. See 48 C. J., 703. The burden is upon the one charging unconditional acceptance to show such acceptance."

The Court, we believe, recognizes this rule. There is nothing in the evidence which takes the case out of the ordinary check transaction as far as the insured is concerned.

(2) The retention of the check by the Portland office from the time it received the same until it deposited it on November 18 is not evidence of an agreement of unconditional acceptance. Here again the presumption is that the check was received conditionally to be deposited before the expiration of the grace period. The Court states that on account of the postdating there was implied notice that there was insufficient money presently on deposit. The implied notice, we submit, was that there would be funds on deposit on the date of the check, or the first banking day thereafter, which was within the grace period. May we emphasize that this is not a transaction in which a check was taken to be held beyond the grace period nor a transaction in

which a check was actually held beyond the grace period. The grace period in this case, although by counting days ended on November 17, actually continued through the next day for the reason the 17th was Sunday, a legal holiday. This is the well established rule.

Penn Mut. Life Ins. Co. vs. Miller (C.C.A. 2nd) 16 Fed. 2nd, 13.

Lightner vs. Prudential Ins. Co., 97 Kans. 97; 154 Pac., 227.

Boholes vs. Prudential Ins. Co., 84 N.J. Law 315; 86 Atlantic 438

Penrose vs. Metropolitan Life Ins. Co., 269 N.Y.S., 764

Linfors vs. Unity Life Ins. Co. (S.C.) 1 S. E. 2nd, 781.

We submit that this court should not allow to stand as its considered and final opinion the holding that the payee of a check, which obviously is not given to secure extension of time or credit, is deemed to have accepted the same as unconditional payment merely by holding it for deposit on its date.

(3) The retention of the post office money order at the Portland office for a few days before the same was returned, furnished no rational basis for the jury's verdict. We are concerned here with the question as to evidence of an agreement between the parties. The post office money order incident occurred after the policy had lapsed and long after the rights of the parties had been fixed. The company had already definitely taken the position that the policy had lapsed and that evidence of insurability must be submitted before the policy could be reinstated. Possibly the money order was held pending receipt of evidence of insurability. Certainly nothing in this incident had any bearing whatsoever upon the question of what the parties had agreed in the first place with respect to conditional or unconditional payment of the premiums.

Appellant presented in this appeal specification of error 5 based upon the admission in evidence of the post office money order; plaintiff's Exhibit 8c, Tr. 127 (Appellant's Brief, p. 22). Appellant contended that this exhibit was not competent or relevant. We think that the specification was well taken and merited consideration. In the oral argument the Court suggested that perhaps appellant was not injured by the admission of this Exhibit even though incompetent. We firmly believe that this evidence was incompetent and

irrelevant, that it was prejudicial in the jury trial and that it has apparently influenced and misled the appellate Court into a wrong conclusion.

We hardly need call attention to the rule now firmly established by the Oregon Supreme Court and generally followed in the Federal courts to the effect that in order for a case to be submitted to the jury there must be substantial evidence on all of the material issues.

State Savings & Loan Association vs. Bryant, 159 Ore., 601, 626; 81 Pac. 2nd, 116

Fink vs. Prudential Insurance Co., 162 Ore., 37, 60; 90 Pac. 2nd, 762

Simkins Federal Practice, 3rd Ed., Sec. 626, p. 472

Penn R. Co. vs. Chamberlain, 288 U. S., 333, 343; 77 Law Ed., 819, 824.

Appellant has contended throughout this case that the giving of a check is not absolute payment unless the parties so agree and that proof of such agreement must be clear and satisfactory. This is the doctrine announced

by the Oregon Supreme Court in *Joppa vs. Clark Commission Co.*, 132 Ore., 21, 28; 281 Pac., 834, in which it is stated:

“The mutual intention of the parties that a check shall be given and received as payment may be established by proof either of an express contract or a contract implied in fact, but in either case it must be proved by clear and satisfactory evidence.”

Regardless of whether the agreement must be expressed or implied, certainly the evidence thereof must be substantial—it must be more than a mere scintilla. It is our contention that in this case there is no evidence of such an agreement, express or implied, and that the submission of the case to the jury placed the latter in a position where it had to speculate and guess at the result.

III.

Error of the Court in basing its decision on John Hancock Mutual Life Insurance Company vs. Mann, 86 Fed. 2nd, 783.

The Court apparently holds that the doctrine of the *Hancock case* is applicable to the instant case. We think the Court has failed to see that the facts in that case are

distinctly different from the facts in the present case. The appellant discussed the case in its Reply Brief, pages 6 and 7. The case is not in point because the check in the instant case was not dated after the expiration of the grace period; because there is a limitation of authority in the policies in the instant case not present in that case; and because there was no conduct in the instant case indicating an acceptance of the check as unconditional payment. On the contrary, the conditions contained in the official receipts clearly stated that the check was accepted as conditional payment only. It will be noticed that the opinion in the *Hancock case* clearly states in italicized type:

The date therein fixed (in post dated check) extended beyond the payment date of the premium and the thirty days grace.

Furthermore, the Court apparently has failed to see the real force and significance of the clear-cut expressions in the several cases cited in appellant's opening brief holding not only that checks given for the payment of life insurance premiums are conditional payments but also that the burden is upon the person claiming that the check was accepted as payment to prove an agreement to accept the check as payment by clear and satisfactory evidence (Appellant's Brief, pages 28-30).

Appellant prays that these cases be given the weight and consideration to which they are entitled and that the Court also give effect to the issuing by the defendant company of the conditional receipts and the mailing of them to the insured on November 18 (Tr. pp.38, 182, 183).

IV.

Error of the Court in apparently allowing its decision to be affected by questions of waiver and estoppel, the elements of which are not in the case.

The Court apparently thinks that the defendant company should be held responsible because the insured suffered an unfortunate accident after the date of the dishonor of the check and before he had an opportunity to determine whether or not he desired to reinstate. Certainly the company was not responsible for the non-payment of the check. It was this non-payment which caused the policy to lapse. We claim it is mere speculation to say what insured might have done toward reinstating the policies or either of them if he had received his mail on November 27 before his injury or if he had not been injured on that day. He, and he alone, had the right to elect either to allow the policies to

remain lapsed or to apply for reinstatement as provided in the reinstatement clauses.

Appellant requests the Court to consider the opinion in Security Trust Co. vs. Mutual Life Insurance Co. (District Court E. D. Ky.) 48 Fed. Supp. 779. The decision was not published until after the oral argument in this case. In that case the quarter-annual premiums were payable May 30 with a provision for a grace period of 31 days thereafter. This period was extended by written agreement to July 31. On July 30 checks were delivered to the company for the premiums. They were presented to the bank, payment was refused and the checks were returned; after communicating with the insured the checks were again presented and payment again refused, just prior to the day on which insured was found dead, August 5. The Court held that the presentation of the checks to the bank a second time amounted to nothing more than an act of grace or indulgence affording the insured an opportunity to fulfill the condition upon which the checks, if paid, were to be treated as timely payment of the premiums and that such an act of indulgence did not abrogate the conditions upon which the checks had been accepted nor imply recognition of them as evidence of subsisting indebtedness so as to constitute a waiver of forfeiture

in the event they were not paid. The Court then states (48 Fed. Supp. 779, 783):

"After having twice declined to pay the checks during the life of Mr. Gault, the effort of the plaintiff to save the situation by tendering payments after it discovered that he was dead, contributed nothing to the restoration of plaintiff's rights under the policies. It was like trying to place a bet on the winner after the race was run.

"(6) 'Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party, on which to base a reasonable excuse for the default.' Thompson vs. Insurance Company, 104 U. S. 252, 260; 26 L. Ed. 765."

It is appellant's contention that there are no acts of waiver or estoppel in this case; and that, as stated in the minority opinion, the intention of the insurance company that the check was conditional payment only is absolutely clear throughout the entire record.

We believe the Court has grievously erred in holding the company liable on account of matters which occurred after the policy had lapsed and which we earnestly believe had nothing at all to do with the one and only issue in the case: Had the premiums been paid at the time of the death of insured? Such premiums had not been paid and the company had in no way represented

or advised the insured or anyone else that they had been paid. In fact, it had expressly advised that they were not paid and that the policies had lapsed.

We respectfully submit that the present decision should not be allowed to stand as the final opinion of the Court; that in fairness to appellant and to other insurance companies and business concerns doing business within the jurisdiction of this Court further consideration should be given to the points discussed herein and to the matters so well and forcibly set forth in the dissenting opinion; that for this purpose rehearing should be granted.

Respectfully submitted,

HUNTINGTON, WILSON & DAVIS,

W. M. HUNTINGTON

ROLAND DAVIS

Attorneys for Appellant,

514 Porter Building,

Portland, Oregon.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

W. M. HUNTINGTON,

Of Attorneys for Appellant.

United States
Circuit Court of Appeals
for the Ninth Circuit.

SEATTLE RENTON LUMBER COMPANY, a
corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

NOV 10 1981

PAUL P. GREGORY



United States
Circuit Court of Appeals
For the Ninth Circuit.

SEATTLE RENTON LUMBER COMPANY, a
corporation,

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*Page numbering appearing at foot of page of original certified
Transcript of Record.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 21197

SEATTLE RENTON LUMBER CO., a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

PETITION

Comes now the Seattle Renton Lumber Co., and presenting its petition, alleges the following facts:

I.

That your petitioner is a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Seattle in King County, Washington, which is the residence of the said corporation. That said corporation has paid all annual license fees owing to the State of Washington.

II.

That your petitioner made an income tax return for the year 1933 showing a net income of \$3,571.15, on which it paid an income tax of \$491.03 and no excess profits tax. That the Income Tax Department of the United States audited the said return

and found that the corrected net income for said year should be \$23,737.70 and that the income tax liability thereon should be \$3263.93, and the excess profits tax owing \$874.39. Your petitioner admits a correction so that the net income should have been \$4119.60, on which the income tax would have been \$566.44, and on which no excess profits tax would have been owing.

III.

On July 1, 1933, your petitioner sold its plant and inventories, being most of its assets except its accounts receivable, to a partnership composed of the stockholders of the corporation, which [2] partnership called itself the Seattle Renton Mill Co. Said partnership made an income tax return of its profits for the last half of 1933, and the partners included in their individual returns their proportion of the partnership income. The report of the audit of the Income Tax Department was to the effect that the said transfer to said partnership was not complete, and the income of the said partnership for the last half of 1933 was therefore ruled to be income received by the corporation, thereby adding to the corporate income \$19,618.10, and causing the extra tax liability over and above that admitted your petitioner as set forth in Paragraph II.

IV.

The corporation protested the action of the Internal Revenue Agent to the Commissioner of Internal Revenue, but its protest was overruled, and

notice of deficiency was given and mailed January 10, 1936 and on May 11, 1936. The corporation made the following additional payments to Alex McK. Vierhus, Collector of Internal Revenue, at Tacoma, Washington.

Additional income tax.....	\$2,772.90
Interest on same.....	350.71
Excess Profits tax.....	874.39
Interest on same.....	110.58

That claims for refund of both the income tax and the excess profits tax were filed with the Collector of Internal Revenue at Tacoma on the 6th day of November, 1936, the said two claims for refund being on Treasury Department Form 843, and being respectively in the words and figures following:

“CLAIM

State of Washington,

County of King—ss.

Name of taxpayer or purchaser of stamps—

Seattle Renton Lumber Co. [3]

Business Address: Bryn Mawr, Washington.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Tacoma, Washington.
2. Period (if for income tax, make separate

form for each taxable year) from January 1, 1933 to Dec. 31, 1933.

3. Character of assessment or tax: Income.

4. Amount of assessment: \$2772.90 and Int. \$350.71. Dates of payment: May 11, 1936.

5. Date stamps were purchased from the Government:

6. Amount to be refunded: Three Thousand Thirty Eight and 40/100 \$3038.40.

7. Amount to be abated (not applicable to income or estate taxes)

8. The time within which this claim may be legally filed expires under Section 322 of the Revenue Act of 1934, on May 10, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

The taxpayer on June 30, 1933 sold all of its assets except its cash and bills receivable and accounts receivable to a partnership called Seattle Renton Mill Co. composed of all its stockholders with interests proportional to their stock holdings in the corporation. This partnership made its separate information return showing profits on the conduct of the business for the last half of the year. The Department in its audit of the corporation books made adjustments showing a net increase of taxable income for the first half year of \$548.45. It also found that the income of the partnership for the last half year should be consolidated with the corporate income on the ground that cer-

tain formalities and certain notices were lacking to make the transfer of the business to the partnership effective. We consent to the adjustment of income for the first half year, thus adding \$548.45 to the net income shown in our return for 1933, but maintain that the partnership was properly formed and conducted the business for the last half of 1933 and that the consolidation of the partnership income with the corporate income was improper. The tax on the additional \$548.45 of income which we admit would amount to \$75.41, and the interest on that item to May 11, 1936, \$9.80. On May 11, 1936 we paid \$2772.90 income tax and \$350.71 interest on the same based on the Department report, and submit that the same should be refunded less the amounts above conceded, or a net refund of \$2697.49 tax and \$340.91 interest on same, together with interest on these sums since May 11, 1936.

SEATTLE RENTON LUMBER CO.

By F. M. ROBERTS

Sec. & Treas.

Sworn to and subscribed before me this 6th day of November, 1936.

[Seal]

MIKE COPASS

Notary Public" [4]

“CLAIM

State of Washington,
County of King—ss.

Name of taxpayer or purchaser of stamps:
Seattle Renton Lumber Co.

Business Address: Bryn Mawr, Washington.

The deponent, being duly sworn, according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Tacoma, Wash.
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1933 to Dec. 31, 1933.
3. Character of assessment or tax: Excess profits.
4. Amount of assessment, \$874.39 & Int. \$110.58; dates of payment: May 11, 1936.
5. Date stamps were purchased from the Government:
6. Amount to be refunded: Nine Hundred Eight Four 97/100 \$984.97.
7. Amount to be abated (not applicable to income or estate taxes)
8. The time within which this claim may be legally filed expires, under Section 322 of the Revenue Act of 1934, on May 10, 1938.

The deponent verily believes that this claim should be allowed for the following reasons:

The taxpayer on June 30, 1933 sold all of its assets except its cash and bills receivable and accounts receivable to a partnership called Seattle Renton Mill Co. composed of all its stockholders with interests proportional to their stock holdings in the corporation. This partnership made its separate information return showing profits on the conduct of the business for the last half of the year. The Department in its audit of the corporation books made adjustments showing a net increase of taxable income for the first half year of \$548.45. It also found that the income of the partnership for the last half year should be consolidated with the corporate income on the ground that certain formalities and certain notices were lacking to make the transfer of the business to the partnership effective. We consent to the adjustment of income for the first half year, thus adding \$548.45 to the net income shown in our return for 1933, but maintain that the partnership was properly formed and conducted the business for the last half of 1933 and that the consolidation of the partnership income with the corporate income was improper. Without the partnership income consolidated, the net income of the corporation was insufficient to render it liable to any excess profits tax for the reason that its capital stock tax return

showed a value of \$50,000. 12½% of that would be \$6250.00, an amount in excess of the corporate net income without a consolidation of the partnership income.

SEATTLE RENTON LUMBER
CO.

By F. M. ROBERTS

Secretary & Treas.

Sworn to and subscribed before me this 6th day of November, 1936.

[Seal] MIKE COPASS

Notary Public." [5]

V.

That on April 9, 1937 the Commissioner of Internal Revenue mailed a notice to your petitioner that said claims had been rejected, the said notice being in the words and figures following:

"TREASURY DEPARTMENT
Washington

IT:C:CC-4-CCP

Apr. 9, 1937

Seattle Renton Lumber Co.,
Bryn Mawr, Washington.

In re: Claims for refund of \$984.97 and
\$3038.40

for the years 1933

Sirs:

Reference is made to Bureau letter dated January 27, 1937 wherein you were informed that the claims for refund indicated above

would be disallowed. The letter also stated the reasons for the proposed disallowance.

The claims having been disallowed or rejected on Schedule numbered 23241, this notice of disallowance is sent to you by registered mail as required by Section 1103(a) of the Revenue Act of 1932.

Respectfully,

GUY T. HELVERING,

Commissioner

By CHAS. BUNELL

Deputy Commissioner."

VI.

That Alex McK. Vierhus, to whom payment was made of the said income taxes, is no longer Collector of Internal Revenue at Tacoma, Washington as he was when the said payments were made.

Wherefore, your petitioner prays judgment against the United States of America in the following sums: \$2697.49 income tax, and \$340.91 interest paid on same; and \$874.39 excess profits tax and \$110.58 interest paid on same; plus interest at 6% on all of the above stated amounts from the date of payment thereof, towit May 11, 1936.

WETER, ROBERTS &
SHEFELMAN

Attorneys for Petitioner. [6]

State of Washington
County of King—ss.

F. M. Roberts, being first duly sworn, on oath deposes and says: That he is the Secretary of the

Seattle Renton Lumber Co., a corporation, plaintiff in the within action, and as such is authorized to and does make this verification for and on its behalf; that he has read the foregoing Petition, knows the contents thereof, and believes the same to be true.

F. M. ROBERTS

Subscribed and sworn to before me this 5th day of March, 1938.

[Notary Seal] JAMES P. WETER
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Mar. 12, 1938. [7]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant United States of America, by and through its attorneys J. Charles Dennis, United States Attorney for the Western District of Washington, and Gerald Shucklin, Assistant United States Attorney for said District, and for answer to the Petition of the plaintiff herein, admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in paragraph I of plaintiff's petition herein.

II.

Defendant admits the allegations contained in paragraph II of plaintiff's petition herein.

III.

In answer to paragraph III of plaintiff's petition, defendant specifically denies that on July 1st, 1933, or at any other time during the year 1933, the petitioner sold its plant and inventories, being most of its assets except its accounts receivable, to a partnership composed of the stockholders of the corporation, which partnership called itself the Seattle Renton Mill Co. Defendant admits that the alleged partnership made an income tax [8] return of its profits for the last half of 1933, and that the alleged partners included in their individual returns their purported proportion of the alleged partnership income.

Further, in answer to the allegations set forth in paragraph III of plaintiff's petition, defendant states that the Commissioner of Internal Revenue has allowed refunds to such purported partners based, *inter alia*, on the ground that the income reported by them as received from the alleged partnership of the Seattle Renton Mill Co. was not actually received by them and that this income was taxable as corporation income to the Seattle Renton Lumber Company, a corporation.

Defendant admits all of the remaining allegations set forth in paragraph III of plaintiff's petition.

IV.

In answer to paragraph IV of plaintiff's petition, defendant admits that claims for refund in the words and manner set forth in such paragraph was filed as alleged, but defendant denies that the facts averred in said claim are true. Defendant admits all of the remaining allegations set forth in said paragraph IV of plaintiff's petition.

V.

Defendant admits the allegations contained in paragraph V of plaintiff's petition.

VI.

Defendant admits the allegations contained in paragraph VI of plaintiff's petition. [9]

Wherefore, having fully answered the Petition of the plaintiff herein, defendant prays for judgment of the above entitled Court dismissing said Petition with prejudice, and that it be allowed its costs and disbursements herein.

J. CHARLES DENNIS

United States Attorney.

GERALD SHUCKLIN

Assistant United States
Attorney.

United States of America
Western District of Washington
Northern Division—ss.

Gerald Shucklin, being first duly sworn, on oath deposes and says: That he is an Assistant United

States Attorney for the Western District of Washington, and as such makes this verification for and on behalf of the United States of America, defendant herein; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

GERALD SHUCKLIN

Subscribed and sworn to before me this 24th day of August, 1938.

[Seal]

ELMO BELL

Deputy Clerk, United States
District Court, Western Dis-
trict of Washington.

[Endorsed]: Received a copy of the within answer this 26 day of Aug. 1938.

W. R. SHEFELMAN

Atty for Pltf.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 26, 1938. [10]

[Title of District Court and Cause.]

REPLY

Comes now the Seattle Renton Lumber Co., a corporation, the petitioner herein, and for reply to the Answer of the defendant herein, admits, denies and alleges as follows:

I.

For reply to the new allegations contained in Paragraph III. of said Answer your petitioner

states that the Commissioner of Internal Revenue upon his own initiative made an offer to allow refunds to the partners of the Seattle Renton Mill Co. on their 1933 income tax, basing said offer upon the alleged ground that the income reported by said partners as received from the Seattle Renton Mill Co. was not actually received by them and that said income was taxable as corporate income to the Seattle Renton Lumber Co., a corporation. Your petitioner further states that said offer to allow said refund was not accepted by said partners.

Your petitioner denies, however, that the Commissioner of Internal Revenue actually allowed said refunds to said partners, as stated by defendant.

Wherefore, having fully replied to the Answer of the defendant herein, your petitioner prays for Judgment as in its Petition set forth.

WETER, ROBERTS &
SHEFELMAN
S. HAROLD SHEFELMAN
Attorneys for Plaintiff. [11]

State of Washington
County of King—ss.

F. M. Roberts, being first duly sworn, on oath deposes and says: That he is the Secretary of the Seattle Renton Lumber Co., a corporation, plaintiff in the within action, and as such is authorized to and does make this verification for and on its be-

half; that he has read the foregoing Reply, knows the contents thereof, and believes the same to be true.

F. M. ROBERTS

Subscribed and sworn to before me this 6th day of December, 1938.

[Seal] VICTOR D. LAWRENCE
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Received a copy of the within Reply this 9 day of Dec. 1938.

J. CHARLES DENNIS,
Atty. for Deft.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 9, 1938. Elmer Dover, Clerk. By S. Cook, Deputy. [12]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties *herto*, by their attorneys of record hereunder signed, that the within cause, which was heretofore submitted to but has not yet been decided by the Honorable Edward E. Cushman, shall be submitted to the Honorable Lloyd L. Black for decision upon the written transcript of the evidence now on file in the within cause, and without the

introduction of further testimony, but with the right reserved to each party to argue the matter orally.

This stipulation is submitted subject to the approval and order of the Honorable Lloyd L. Black.

June 18, 1940.

WETER, ROBERTS &

SHEFELMAN

Attorneys for Plaintiff.

J. CHARLES DENNIS

United States Attorney.

GERALD SHUCKLIN

Assistant United States

Attorney.

[Endorsed]: Filed Aug. 2, 1940. [13]

[Title of District Court and Cause.]

ORAL DECISION

The Court: Everybody ready?

Mr. Roberts: Mr. Shucklin cannot be here today.

The Court: Mr. Clerk, will you see if the United States Attorney or his assistants can be here?

The Clerk: Mr. Winter cannot be here and Mr. Roberts says that Mr. Shefelman cannot be here today.

The Court: I would ask this: Is the reporter who is here a joint reporter for both sides?

Mr. Roberts: I understand so; I have asked him to make a copy of your opinion for us and it is understood that the Government's attorney gets a copy, whether the Government has requested it or not.

The Court: That is a copy of the opinion I am about to render?

Mr. Roberts: We are so informed.

The Court: Whether the Government has made arrangements or not since the Government counsel is [14] absent, plaintiff must permit the Government to obtain a copy of the opinion.

Mr. Roberts: I would like to state that Mr. Shefelman would have been in here but he left by plane for Chicago yesterday afternoon.

The Court: I would like to delay my oral opinion until counsel for the Government are present; but as I am required to continue with a jury in a very important case in Tacoma, beginning at ten o'clock this morning, I will proceed.

I would say that under the requirements the Government's attorneys are to have access to the reporter's notes; and I will now advise counsel of the conclusion to which I have come.

In this action the plaintiff seeks a judgment against the United States for a refund of income tax and excess profits tax and interest thereon paid by the plaintiff in May, 1936, under protest.

It is the contention of the plaintiff corporation that on June 30, 1933 the corporation declared a dividend of all its assets except certain accounts

receivable, and transferred such assets, including the plant and real property of the corporation, to the stockholders as a partnership and that thereafter such partnership conducted what was formerly the business of the corporation. The Government insists that in fact there was no partnership formed; that actually the corporation continued to function and that the business activities, earnings and profits continued to be those of the corporation.

A petition was served and filed in 1938, and after issue was joined in the matter it came on for [15] hearing in January, 1939, before the Honorable E. E. Cushman, Judge of the United States District Court. After the evidence had been presented counsel submitted their arguments by briefs, and before Judge Cushman rendered his decision his illness and retirement occurred.

Thereafter, and in the fall of 1940, pursuant to stipulation of the parties, the matter was submitted to me on the record of the case, consisting of the files, written transcript of the evidence, and the briefs which were submitted by counsel to Judge Cushman in January, 1939, together with oral argument before me.

The defendant had introduced in the hearing before Judge Cushman no evidence except by way of two exhibits, consisting of a check and a letter setting forth the basis on which the government's claim of assessment was rendered and except for such evidence as the government may have introduced by way of cross-examination.

The matter therefore comes before me substantially upon the uncontradicted evidence introduced before Judge Cushman by plaintiff. I did not hear the witnesses testify and so I take it that my decision is to be distinguished from that of Judge Cushman who had an opportunity to observe the witnesses. I may be considered as having heard the case upon depositions.

The transcript shows that the plaintiff company was incorporated in 1929; that it built a sawmill on Lake Washington and was continuously engaged in the manufacture and sale of lumber there until at least the last day of June, 1933. That "at least" is [16] rather the crux of the legal controversy.

There were approximately fourteen stockholders listed on the books of the corporation as holding a total of 900 shares. It seems that Mr. E. M. Roberts had about 237 2/3 shares, Mr. James C. Carlson about 215, Mr. James P. Weter about 211, and Mr. C. A. Shinstrom 100 shares, and the balance of 136 shares was divided among about ten other persons varying from 1 share to 37. Mr. Carlson was the president and active manager of the corporation and Mr. Roberts was the secretary-treasurer of the corporation. The trustees appear to have been Mr. James P. Weter, Mr. J. C. Carlson and Mr. F. M. Roberts. With the exception of the stock appearing in the name of Mr. J. C. Carlson and some small amounts in the names of his wife and two children, and the stock held by Mr. J. P. Weter, it appears that the stockholders besides F. M. Rob-

erts were blood relatives or relatives by marriage of Mr. F. M. Roberts.

Mr. Roberts testified that beginning in the spring of 1933, he discussed a change from a corporation to a partnership or a sale of the assets with the different stockholders.

In this connection it is proper to quote the testimony of Mr. Roberts as it appears in the transcript.

In answer to a question this is Mr. Roberts' answer:

"It was discussed with all the stockholders who were of age; it was discussed by me with all of them, except Mr. Carlson's wife and his two children; we had no formal corporate meeting at which it was [17] discussed, but we were, all of us, frequently together in groups, or I with individuals of the group and I discussed it with them, the purposes of it and it met with the approval of all of the stockholders. There was no special discussion, other than the purpose of it with any one except Rex Swan. Rex Swan was the Cashier of the First National Bank at Redmond, in which he owned no stock; he had formerly been bookkeeper of another mill concern in which Mr. Carlson and I were interested, and when this was organized, he took some stock in this company and my discussion with Mr. Swan—I suggested that it would be of advantage to him to become a stockholder of the bank, of which he was Cashier, since he wasn't on the Board of Directors and he would then be able to go on the

Board of Directors and I suggested to him that I would trade him bank stock for his stock in the mill, at the same time telling him that for the first time in the existence of this mill company, the prospects for substantial profits looked good. He said he would rather keep his stock in the mill and it was entirely agreeable to him to have it go into a partnership. I might add this was just (without knowing the date of the beginning of the NRA days) and it looked as though the NRA would enable us to make the mill make money, as it hadn't made it in any amount before."

The purpose of such change, as frankly stated by Mr. Roberts and Mr. Weter, and probably by Mr. Carlson, was to reduce or avoid the payment of income taxes. It was the established practice of the corporation on the last of June and the last of December to take a full inventory and make [18] a profit and loss report. The testimony is that under date of June 15 the following notice was mailed to all of the stockholders of the corporation:

"Bryn Mawr, Washington, June 15, 1933
"To the stockholders of the Seattle-Renton Lumber Company:

"You are hereby notified that there will be a special meeting of the stockholders of this corporation held at the mill office at three P. M., June 30, 1933, to pass upon the question of the sale of the assets of the corporation to a partnership to be formed to take over the same.

(Signed) R. M. ROBERTS, Secretary."

Exhibits 2 and 3 are minutes of a trustees' meeting and a stockholders' meeting, respectively, which purport to have been held at the mill. The minutes of the stockholders' meeting recite that the following stock was personally represented at such meeting: 100 shares, C. A. Shinstrom; 230 shares James C. Carlson; Mr. F. M. Roberts 212 shares; Mr. James P. Weter 222 shares.

However, plaintiff frankly concedes that there was no meeting at all at the mill and that the only meeting on that day of either stockholders or trustees was at the Seattle law office of Mr. Roberts and Mr. Weter. It would appear from the evidence that actually the only stockholders present were Mr. Carlson, Mr. Roberts and Mr. Weter.

At the time of the trustees' meeting and the stockholders' meeting a bill of sale by the Seattle-Renton Lumber Company reciting the consideration of \$98,662.56 was executed by the corporation through [19] Mr. Carlson as president and Mr. F. M. Roberts as secretary of the Seattle-Renton Lumber Company, to the "Seattle-Renton Mill Company, a partnership," and "its successors and assigns" of all machinery and equipment contained in and about the mill building and premises of the grantor at Bryn Mawr, Washington, together with two Mack trucks, one Ford coupe, one power boat "Peacock", its furniture and equipment, and all lumber, logs and supplies on hand at the said premises.

On the same day there was executed by said cor-

poration to F. M. Roberts a warranty deed to the real estate on which the mill was located. It recited that it was "in consideration of \$40,000, of which \$20,000 is by the assumption of the hereinafter described mortgage". It was likewise signed by James C. Carlson, as president, and Mr. F. M. Roberts, as secretary, of said corporation; but actually such deed does not mention nor describe any mortgage except as above stated. The deed was filed for record on January 2, 1936, some time after the Department had insisted that there was no partnership. Up to that time it had remained in Mr. Roberts' possession. On the same day that the deed was executed, June 30, 1933, Mr. Roberts executed a declaration of trust acknowledging conveyance to him of the deed and reciting that it was for the "following named persons in the following proportion"; which is a somewhat different list than appears upon the books of the corporation as stockholders. This recital of this trust deed recited that the title was taken by Mr. Roberts to said real estate in trust for the partners, as the Seattle-Renton Mill Company. The bill of sale did not list the membership [20] of the Seattle-Renton Mill Company, which the bill of sale described as a partnership. Neither the bill of sale nor the declaration of trust was ever filed. Both were kept by Mr. Roberts.

After June 30, 1933, on signs and stationery, the word "lumber" was changed or printed to read "mill", such alteration being by stamp or ink, so

that the name read "Seattle-Renton Mill Company". There was no indication as to whether it was or was not a corporation. In the fall 10,000 checks were printed for the Seattle-Renton Mill Company with blanks for the signatures of the president and secretary. A mistake was made in having such titles printed. But such checks were made use of rather than to send them back.

Mr. Carlson continued as manager at practically the same salary he received before 1933. The same bookkeeper continued on salary. There was no written articles of partnership. Neither was there any written or published notice of the formation of the partnership, and no filing in the auditor's office of a certificate of an assumed business name. Except for the mortgage the payment of the company's indebtedness was on a current basis. Customers of the mill when they telephoned as to the reason the word "lumber" had been changed to "mill" were told the concern had become a partnership without being told the names of any partners and without being given any further explanation.

In 1934 such individuals included in their return their earnings from such business in the last six months of 1933, as their individual income. Mr. Roberts had been associated with a number of these stockholders and perhaps some other persons in different partnerships [21] for which there were no written partnership agreements. The Seattle-Renton Lumber Company, a corporation, continued to exist as such, paying its annual license fees to the State of Washington.

The Government insists that the foregoing and such other circumstances as appear in the evidence wholly fail to establish that the corporate business and operating assets were transferred to a partnership.

The plaintiff insists that under the same facts and circumstances as above mentioned it is established that there was an actual partnership formed which operated the business from June 30, 1933.

The briefs of counsel cited a number of authorities on which they respectively depend. It is not necessary to cite them here because in the main counsel on both sides agree as to the general law of partnership, of taxation and of corporations. It is true, as suggested by counsel for plaintiff, that individuals may be associated as a partnership under an oral agreement which may be most informal. The issues in this case are whether or not on or before June 30, 1933, an actual partnership came into being, and whether on June 30, 1933 the operating assets of the corporation were transferred to an actual partnership then existing and whether or not such a partnership took over what had been previously the business of the corporation.

In the final analysis the issue is whether or not on or before June 30, 1933 there was an actual partnership. I examined the record in this case very diligently, including not only the testimony but the exhibits, and have studied the authorities cited by counsel and have made some independent investigation of [22] my own. Without more ado, I

may advise counsel in this oral opinion that my conclusion is that the plaintiff failed to establish by the preponderance of the evidence that the Commissioner of Internal Revenue was in error or that there was on or before June 30, 1933 a partnership.

I am giving counsel some of the reasons that appeal to me in reaching this conclusion.

The test in this case is whether or not there was a partnership on or before June 30, 1933. I have already referred to much of the testimony on this question. Mr. Roberts is an attorney and it must be assumed that the evidence that he gave was as strong as the facts were. He testified there was a primary purpose to avoid the payment of such income taxes as would be required under corporate organization. True, as stated in the brief, such was permissible. But plaintiff has the burden of proving the timely existence of a partnership and all other requisite steps to accomplish such purpose. It seems to me that the most that Mr. Roberts' testimony tells us is that he spoke to the stockholders of the desirability of forming a partnership some time in the future and that they indicated their approval of such an idea. In fact, the testimony of Mr. Roberts as to Mr. Swan, who was the one to whom the agreement as to the partnership was most definitely stated, reads as follows: "He said he would rather keep his stock in the mill and it was entirely agreeable to him to have it go into a partnership." As to the others generally, according to Mr. Roberts, they were only told the purpose. [23]

Ruling Case Law cited by counsel says this:

"A partnership can be created only by contract either express or implied," and goes on to say that in every case in which a partnership is created there must be an agreement and a meeting of the minds of the parties. That is on page 810 of 20 RCL. On the next page, under "Executory and Executed Agreements", we find this:

"A marked distinction exists in law between an agreement to enter into the copartnership relation at a future day and a copartnership actually consummated. A partnership in fact cannot be predicated on an agreement to enter into a copartnership at a future day unless it be shown that such agreement was actually consummated. So long as an agreement remains executory the partnership is inchoate, not having been called into being by the concerted action necessary under the partnership agreement."

And on page 847 of 20 RCL this language appears:

"The best evidence of the existence of a partnership consists of the agreement or contract between the parties, but it may be proved by any competent evidence."

And further on page 849 it says:

"The burden of proving the existence of a partnership is ordinarily on him who alleges and relies on the fact of its existence."

On page 876 and 877 we find these quotations:

"Yet in the absence of any express agreement

to the contrary, a partner is impliedly bound reasonably to devote himself to the advancement of the copartnership of which he has become a member." Then it says, [24] on page 877, "The general rule is that a partner is not entitled to compensation for services in conducting the partnership business beyond his share of the profits unless there is a stipulation to that effect, and that he has no right by implication to claim anything extra by reason of any inequality of services rendered by him, as compared with those rendered by his co-partners."

On pages 912 and 913 we find as an expression of what is generally recognized, the following:

"Whenever the partnership relation is shown to exist, each partner is liable individually for all the debts of the firm, and as it is sometimes stated, each partner is liable in solido for firm debts."

At page 1067 it has the following to say:

"Persons who are not actually partners may nevertheless become subject to the liabilities of partners, either by holding themselves out as such to the public and the world generally, or to particular individuals; or by knowingly or negligently permitting another person to do so. Yet in fact such a person does not become a partner; he is merely liable as a partner; for individuals may be liable as partners as to third persons, while as between themselves they are not to be considered partners."

Some of the reasons that appeal to me in my conclusion that there was no partnership by June 30, 1933, are the following:

First: The notice, as I have read, was to the effect that on June 30, 1933 the stockholders were to pass upon the question of the sale of the assets of the corporation to a partnership to be formed. That is on June 15, 1933 it was acknowledged in the notice that [25] the partnership had not yet been formed. In the trustees' meeting minutes we find this language in the resolution:

"Resolved that the Seattle-Renton Lumber Company sell to a partnership, which will be composed of the same persons who have held stock in the Seattle Renton Lumber Company and which will be known as the Seattle Renton Mill Company * * *."

Again there is an implied acknowledgment that the partnership had not yet been formed.

I am of the opinion that on June 30, 1933 at the stockholders' meeting there were only three stockholders present. I am aware, of course, of the general rule that the minutes of a corporation imply verity, and are presumed to be correct. But under all the evidence in this case the minutes must have been written in advance. They were written anticipating that the stockholders' meeting would be held at the mill. I am quite satisfied, in view of the notice, that no stockholders' meeting could have been held legally at any other place than at the mill as far as binding the stockholders who did not attend. Mr. Roberts stated frankly that it was held in Seattle at his law office for the convenience of Mr. Weter and that Mr. Carlson went down with him to the law office and met Mr. Weter. There was

not a syllable of evidence that Mr. Shinstrom was present. But assuming that Mr. Shinstrom were present and assuming that a majority of the stockholders would be authorized to sell the assets of this corporation, still there was no actual sale. There was at most merely a liquidating dividend. Neither three stockholders nor even four stockholders [26] could on June 30, 1933 agree that some other persons should be partners and make it effective unless those other persons agreed. Now the other persons were not even at this meeting.

I am not overlooking the fact that Mr. Roberts has entered into a number of partnerships without written articles. Such evidence to my mind merely goes to the good faith of Mr. Roberts. There is a far cry between individuals associating themselves in partnership with oral articles and a corporation being transformed to a partnership. In the one instance a partnership is implied from very casual evidence. That is because there is a necessity of some legal classification of their acting together. But where there is an actual corporation if the stockholders continue to carry on a business which the corporation has been previously carrying on there is no necessity to call the stockholders partners. There is no necessity of suggesting that a partnership is the vehicle because the corporate vehicle is already in existence and they have been traveling in it.

I was unable to find any authorities, and counsel have cited me none, where a corporation was trans-

formed into a partnership of its stockholders under the casual circumstances produced in the evidence. I have not overlooked the contention of Mr. Shefelman that these persons whom the plaintiff contends were partners could not have escaped liability for being partners. As I have indicated by the quotations from Ruling Case Law such would not be because they were partners, but because by certain conduct of their own they have estopped themselves from denying they were partners. [27] If we adopt the principle of estoppel I am not sure that it would apply to more than Mr. Weter, Mr. Roberts and Mr. Carlson. It might possibly apply to Mr. Shinstrom. I find nothing in this record to estop the other ten or eleven stockholders from denying they were partners. Certainly the Government could not be estopped from asserting what were the real facts merely because three or four who met at a meeting on June 30, 1933 would be estopped.

There is one question which was not discussed by counsel except by implication, and that is what was the effect, if any, of the income tax returns in 1934 as shown by the pleadings? I assume such returns were made about March, 1934. It is not necessary for me to determine whether or not by such income tax returns the June 30, 1933 offer of Mr. Carlson, Mr. Roberts and Mr. Weter to the others to join in a partnership was accepted and ratified. I am much inclined to believe that in March, 1934 what previously had been an agreement for a partnership became a partnership in

fact. However, no such ratification in 1934 between the parties could relate back to June, 1933 as against the Government. It is not permitted to await developments and then to bind the Government as of the original date of subsequent ratification.

If a corporation could be converted into a partnership under the facts and circumstances here related then minority stockholders generally would be in a very perilous situation.

I have not mentioned the failure to file or even to execute a certificate of assumed business name or the failure to file the trust agreement or bill of sale, [28] or failure to record the deed as being fatal. There can be no question but that if the parties intended to convince third parties that a partnership had come actually into being on June 30, 1933 that it would have been most advisable to have done the things which in this instance were not done. However, if the stockholders did not actually form a partnership on or before June 30, 1933 even the doing of all these things would not have made a partnership exist.

As I stated, I was not the judge who heard the witnesses, and my conclusions do not have the weight of finality of a judge before whom the testimony was taken. On the record presented to me I have been unable to reach any other conclusion than as stated here.

The plaintiff's petition and action will be dismissed.

Mr. Winter: We will present findings, conclusions and judgment accordingly, on your Honor's ruling.

The Court: I would like the record to show this, if it does not already show it—I have no finding or feeling of any bad faith whatsoever in this matter. I just feel that some of the stockholders incorrectly assumed that a majority of the stockholders could by their vote convert the absent ones from stockholders to partners.

The Court will be adjourned until Monday morning next.

[Endorsed]: Filed Aug. 25, 1942. [29]

[Title of District Court and Cause.]

No. 21197

MOTION FOR A NEW TRIAL.

Comes now the plaintiff, Seattle Renton Lumber Co., a corporation, by its attorneys Weter, Roberts & Shefelman and S. Harold Shefelman, and moves the court to grant a new trial in this action for the following cause materially affecting the substantial rights of the plaintiff, to-wit:

Insufficiency of the evidence to justify the decision of the Court. There was no evidence adduced in this action that the plaintiff engaged in business or received income so as to subject it to a tax after June 30, 1933, but to the contrary, all of the evidence in this action, being the evidence of the plain-

tiff, uncontroverted by the defendant, established that the plaintiff did not engage in any business nor receive any income, so as to subject it to a tax, after June 30, 1933. Under the evidence the decision of the court was error. Judgment should have been granted the plaintiff in accordance with the prayer of its petition.

This motion is based upon the files and records of this court in this action and upon the reporter's transcript of the testimony of the witnesses.

WETER, ROBERTS &
SHEFELMAN
S. HAROLD SHEFELMAN
Attorneys for Plaintiff.

Received a copy of the within Motion this 27 day of Aug. 1941.

J. CHARLES DENNIS
Attorney for Defendant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 27, 1941 [30]

[Title of District Court and Cause.]

No. 21197

ORDER

The plaintiff's motion for new trial in the above-entitled cause having come on regularly for hearing before the above-entitled court, Lloyd L. Black presiding therein, on the 13th day of July, 1942, the plaintiff appearing by its attorneys, Weter, Roberts

& Shefelman, being represented in court by S. Harold Shefelman, and the defendant appearing by its attorney, J. Charles Dennis, United States Attorney for the Western District of Washington, being represented in court by Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, and after oral argument and the Court being fully advised, it is hereby

Ordered that the plaintiff's motion be and the same is hereby denied.

Done in open court this 13th day of July, 1942.

(Signed) LLOYD L. BLACK
 Judge

Plaintiff excepts to the above order denying its motion for new trial and said exception is hereby allowed.

(Signed) LLOYD L. BLACK
 Judge

Approved as to form and notice of presentation waived.

(Signed) WETER, ROBERTS &
 SHEFELMAN

Presented by:

(Signed) THOMAS R. WINTER
 Special Ass't to the Chief
 Counsel Bureau of Internal
 Revenue

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jul. 13, 1942. [31]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Now comes the defendant, United States of America, by J. Charles Dennis, Esquire, United States Attorney for the Western District of Washington, Gerald Shucklin, Esquire, Assistant United States Attorney for said District, and Thomas R. Winter, Esquire, Special Attorney, Bureau of Internal Revenue, and respectfully moves that the Court herewith make, declare and enter special findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

Seattle Renton Lumber Company, (hereinafter called taxpayer) is, and at all times pertinent to this action was, a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Seattle, in King County, Washington. Up to the time of filing this action, it had paid all annual license fees to the State of Washington, provided for by the laws of that state. [32]

II.

The taxpayer filed a corporate income tax and excess profits tax return purporting to be for the calendar year 1933, but including only the results of its operations for the period January 1, 1933, to June 30, 1933, inclusive, which disclosed a net in-

come of \$3,571.15, no excess profits tax liability, and an income tax liability thereon of \$491.03, which it paid.

III.

Thereafter, the Commissioner of Internal Revenue notified the taxpayer of his determination that the taxpayer's net income for the year 1933 was \$23,737.70, and that there was an income tax deficiency of \$2,772.90, and an excess profits tax deficiency of \$874.39, and these tax deficiencies with interest thereon of \$350.71, and \$110.58, respectively, were assessed by the Commissioner, and paid by the taxpayer on May 11, 1936.

IV.

The principal increase in the net income made in the Commissioner's determination was his inclusion of the income arising from the operations of the business from June 30, 1933, to December 31, 1933, which he refused to recognize as income belonging to the taxpayer's stockholders on the theory that they were in that period operating on a partnership basis; he ruled so on the ground that there was no partnership formed; and that actually the corporation continued to function, so that the business activities, earnings and profits during that period continued to be those of the corporation.

V.

Thereafter, on November 6, 1936, the taxpayer [33] filed claims for refund of \$3,038.40, income tax and interest, and for excess profits tax of \$874.39,

and interest thereon of \$110.58, continuing to insist on the partnership theory. The Commissioner rejected these claims and the taxpayer was notified of this action by letter dated April 9, 1937.

VI.

There was no partnership formed by the stockholders of the taxpayer prior to, or on June 30, 1933, or at any time before January 1, 1934.

VII.

The taxpayer operated the business on the same basis after June 30, 1933, as it did prior thereto. Such steps as were taken to change the form of organization were taken for the purpose of reducing, and to avoid the payment of income taxes. However, the steps taken were not sufficient to effectuate a termination of corporate ownership and operation and to supplant the corporation by a different owning and operating organization. It is to be noted that the same interests were supposedly continued in ownership and control of the alleged partnership as were in control of the corporation, but the corporate stockholders were not made partners by any of the steps which were taken.

VIII.

The income arising out of the operation of the business subsequent to June 30, 1933, was income of the taxpayer.

IX.

In any event, the plaintiff has not satisfied the requirements of the burden of proof. [34]

X.

It appears from this record that overpayment of tax is not established.

CONCLUSIONS OF LAW**I.**

The evidence and every inference drawn therefrom is insufficient to justify a judgment in favor of the plaintiff for the amount claimed, or in any amount whatsoever.

II.

From the evidence and every inference properly drawn therefrom, defendant is entitled to judgment, including costs.

III.

The plaintiff has failed to sustain his burden of proving that the Commissioner erred in his determination of the plaintiff's income and excess profits tax liabilities for the tax year 1933.

IV.

The taxes involved herein were legally assessed against and collected from the plaintiff.

V.

The defendant is entitled to judgment.

Dated August 20, 1941.

LLOYD L. BLACK
District Judge

Requested by

J. CHAS. DENNIS
United States Attorney
GERALD SHUCKLIN
Asst. United States Attorney
THOMAS R. WINTER
Special Attorney, Bureau of
Internal Revenue

Presented by

THOMAS R. WINTER
of counsel for Def.

Copy received Aug. 19, 1941.

WETER, ROBERTS &
SHEFELMAN,
Attorneys for Plaintiff.

[Endorsed]: Aug. 20, 1941. [35]

In the District Court of the United States for the
Western District of Washington, Northern
Division

CIVIL ACTION

No. 21197

SEATTLE RENTON LUMBER COMPANY,
a corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on March 15, 1941, before the Court, sitting without a jury, the plaintiff appearing by S. Harold Shefelman, Esq., its attorney, and the defendant appearing by J. Charles Dennis, Esq., United States Attorney for the Western District of Washington, and by Gerald Shucklin, Esq., Ass't United States Attorney, and by Thomas R. Winter, Esq., Special Attorney, Bureau of Internal Revenue; and the testimony of witnesses and documentary evidence having been introduced by the parties and received, and the cause having been submitted to the Court for decision, and the Court having made and filed its findings of fact and conclusions of law, and having ordered a judgment be entered in favor of the defendant in accordance therewith;

Now, Therefore, it is the Judgment of this Court that the plaintiff recovered nothing of the defendant, and that the defendant do have and recover of the plaintiff the costs and disbursements of this action.

Dated this 20th day of August, 1941.

(Signed) LLOYD L. BLACK
District Judge

Presented by

THOMAS R. WINTER
of Counsel for Defendant

Copy received Aug. 19-41.

WETER, ROBERTS &
SHEFELMAN
Atty's for Plt.

[Endorsed]: Aug. 20, 1941. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America, defendant above named, and J. Charles Dennis, United States Attorney, Gerald Shucklin, Assistant United States Attorney, and Thomas R. Winter, Special Attorney, Bureau of Internal Revenue.

Notice is hereby given that the Seattle Renton Lumber Co., a corporation, plaintiff above named, appeals to the United States Circuit Court of Appeals, Ninth Circuit, from the judgment of the court

herein entered on the 20th day of August, 1941, the pertinent part of which reads as follows:

“Now, Therefore, it is the Judgment of this Court that the plaintiff recovered nothing of the defendant, and that the defendant do have and recover of the plaintiff the costs and disbursements of this action.”

Dated this 25th day of August, 1942.

SEATTLE RENTON LUMBER
COMPANY,
a corporation,
By WETER, ROBERTS &
SHEFELMAN,
Its Attorneys

[Endorsed]: Sep. 5, 1942. [37]

[Title of Court and Cause.]

ORDER

This matter having come on regularly for hearing in open Court on the application of Seattle Renton Lumber Co., a corporation, for an order directing the Clerk to include certain exhibits in the record on appeal herein to the United States Circuit Court of Appeals, Ninth Circuit; it appearing that parties hereto have stipulated that certain exhibits be included in the record on appeal,

Now, Therefore, it is hereby Ordered that the Clerk of this court include in the record on appeal herein to the United States Circuit Court of Appeals, Ninth Circuit, all of the plaintiff's exhibits,

being numbers 1 to 13 inclusive, and all of the defendant's exhibits, being numbers A1 and A2 herein.

Done in Open Court this 1st day of October, 1942.
LLOYD L. BLACK
Judge

Presented by:

WAYNE C. BOOTH

Approved:

J. CHARLES DENNIS *
Attorneys for the United
States.

[Endorsed]: Oct. 1, 1942. [38]

[Title of District Court and Cause.]

STIPULATION OF RECORD ON APPEAL
To The Honorable Clerk of the above entitled
Court:

The Seattle Renton Lumber Co., a corporation, appellant, and the United States of America, appellee, by their respective attorneys, Weter, Roberts & Shefelman, and J. Charles Dennis, and Thomas R. Winter, stipulate and designate that the following parts of the record, proceedings and evidence in the above entitled action be included in the record on appeal to the United States Circuit Court of Appeals, Ninth Circuit:

I.

The following pleadings, stipulations, motion and notice:

- a. Plaintiff's Petition, filed March 12, 1938
- b. Defendant's Answer, filed August 26, 1938
- c. Plaintiff's Reply, filed December 9, 1938
- d. Stipulation submitting case to the Honorable Lloyd L. Black, Judge, filed August 2, 1940.
- e. Plaintiff's Motion for New Trial, filed August 27, 1941
- f. Plaintiff's notice of appeal.
- g. Stipulation of record on appeal.

II.

Findings of Fact and Conclusions of Law, signed by the Hon. Lloyd L. Black, Judge, dated and filed August 20, 1941.

III.

Judgment, signed by Hon. Lloyd L. Black, Judge, dated and filed on August 20, 1941. [39]

IV.

Order, signed by Hon. Lloyd L. Black, Judge, dated and filed July 13, 1942.

V.

Reporter's Transcript of Evidence and proceedings in toto, (entitled Statement of Facts), two copies of which are herein filed.

VI.

All of plaintiff's exhibits, being numbers 1 to 13 inclusive, and all of defendant's exhibits, being numbers A-1 and A-2.

VII.

Hon. Lloyd L. Black's decision rendered March 15, 1941, and filed August 27, 1942.

Dated this 1st day of Sept., 1942.

WETER, ROBERTS &
SHEFELMAN

Attorneys for Appellant,
Seattle Renton Lumber Co.

J. CHARLES DENNIS
THOMAS R. WINTER

Attorneys for Appellee, United
States of America.

[Endorsed]: Sep. 8, 1942. [40]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 40, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause together with original Statement of Facts as filed Sept. 8, 1942, as is required by stipulation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the

judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act Feb. 11, 1925) for making record, certificate or return, 34 folios at 5c.....	\$ 1.70
82 folios at 15c.....	12.30
Appeal Fee	5.00
Certificate of Clerk to Transcript of Record.....	.50
Certificate of Clerk to Original Exhibits.....	.50
 Total.....	 \$20.00

[41]

I hereby certify that the above Appeal Fee and cost for preparing and certifying the record, amounting \$20.00, has been paid to me by the attorney for the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 2d day of October, 1942.

[Seal]

JUDSON W. SHORETT,

Clerk of the United States
District Court for the West-
ern District of Washington

By TRUMAN EGGER

Chief Deputy [42]

[Title of District Court and Cause.]

STATEMENT OF FACTS

Be It Remembered, the above-entitled action came on regularly for hearing on this the 23d day of January, 1939, before the Honorable Edward E. Cushman, Judge, sitting in the above-entitled Court, in Tacoma, Washington;

The plaintiff was represented by its attorneys, Weter, Roberts & Shefelman, of Seattle, Washington;

The defendant was represented by its attorney, Thos. R. Winter, Esq., Special Representative, General Counsel, Internal Revenue Bureau, of Seattle, Washington;

Whereupon the following proceedings were had and testimony taken, to-wit: [2*]

Mr. Shefelman: Your Honor, I shall make a statement of the case and follow our petition in the case because, with the exception of a portion of one paragraph, the Government admits all of the allegations of our petition and, therefore, it will be unnecessary for us to adduce any testimony on those points.

(Makes opening statement on behalf of the plaintiff herein.)

Mr. Winter: (Makes opening statement on behalf of the defendant herein.)

*Page numbering appearing at foot of page of original Reporter's Transcript.

TESTIMONY

F. M. ROBERTS,

called as a witness on behalf of the plaintiff herein,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Shefelman:

- Q. Your name is F. M. Roberts? A. Yes.
Q. Where do you live, Mr. Roberts?
A. Seattle.
Q. How long have you lived there?
A. Since 1903.
Q. Your profession is what?
A. I am a lawyer.
Q. And you are a member of the firm of which
I am, a member of the firm of Weter, Roberts &
Shefelman? A. Yes.

Q. You have practiced law in Seattle since what
time? [3]

A. I was admitted to the Bar, I think, in the
spring of 1904, end of 1903, and have practiced con-
tinuously.

Q. What was your connection with the corpora-
tion known as the Seattle Renton Lumber Com-
pany?

A. I was, and am, one of the stockholders, and
was Secretary and Treasurer of the Company and
one of the Board of Trustees.

Q. When was the corporation organized?

A. In the spring of 1929.

Q. And its business was what?

(Testimony of F. M. Roberts.)

A. After incorporation, it built a sawmill on the shores of Lake Washington and was continuously engaged in the manufacture and sale of lumber there up until the last day of June 1933.

Q. Who were the other stockholders in the corporation?

A. James C. Carlson, who was the President and active Manager of the concern; James P. Weter, my law partner; C. A. Shinstrom, my brother-in-law, who is Cashier of the First National Bank of Kirkland; Rex C. Swan, another brother-in-law, who is Cashier of the First National Bank of Redmond. At the time of the inception of the corporation, F. W. Roberts, who was then my father but who died prior to June 30th, 1933, and his interest in the corporation went one-third to myself, one-third to Mrs. Shinstrom, my sister, one-third to my sister, Estelle Roberts—and one-third to myself. The Mrs. Shinstrom I speak of being the wife of C. A. Shinstrom, the Cashier of the First National Bank of Kirkland. Then there were a few shares of stock in my three children, and there were, I think, five shares each in the name of [4] Mr. Carlson's wife and in the name of his two minor daughters.

Q. You and Mr. Weter, of our firm, had been associated together how long in the practice of law?

A. Since 1904.

Q. And have been partners since that time?

A. Yes, as Weter and Roberts, up to some years ago, when Mr. Shefelman joined the firm.

(Testimony of F. M. Roberts.)

Q. You speak of the Kirkland Bank and the Redmond Bank, what is your connection with those institutions?

A. I am President of both of them.

Q. And these other persons of whom you speak were in this transaction were brothers-in-law, Mr. Swan and Mr. Shinstrom, are they also interested in the banks with you? A. Yes.

Q. And is Mr. Carlson interested in any of the banks with you?

A. He is at the present time at Kirkland but I am not sure whether he was a stockholder there at this time, in 1933, or whether he was not.

Q. He is a member of the Board, of course?

A. Yes.

Q. What happened on June 30th, 1933, Mr. Roberts, that causes you to limit your statement that the Seattle Renton Lumber Company operated a mill until that date?

A. On that date, the Seattle Renton Lumber—the mill Company, the corporation, sold its business, including all tangible real estate, personal property, to a partnership, which we named the Seattle Renton Mill Company. [5]

Mr. Winter: Was that contract in writing?

A. There was no contract entered into at that time; there was a conveyance of the real estate.

Mr. Winter: We object to it, we object that the conveyance, the contract is the best evidence.

Mr. Shefelman: I am going to put them in evi-

(Testimony of F. M. Roberts.)

dence. This is preliminary to describing what occurred.

The Court: With that understanding, the objection is overruled.

Q. Now, you speak of this happening on the 30th of June of 1933, had there been any discussion of this change from a corporation to a partnership or sale of the assets prior to that date?

A. Yes, the discussion of that began—I couldn't give a date, but in the spring of 1933.

Q. What was the purpose in making this transfer?

A. To render ourselves liable to smaller income taxes.

Q. In short, to avoid paying any income tax, if it could be legally avoided?

A. Well, to avoid any sizeable corporate income tax and have the profits of the concern reported by the individuals who took it as partners.

Q. You say that discussion started early in 1933. With whom was this matter discussed?

A. It was discussed with all of the stockholders who were of age; it was discussed by me with all of them, except Mr. Carlson's wife and his two children; we had no formal corporate meeting at which it was discussed, but we were, all of us, frequently together in groups, [6] or I with individuals of the group and I discussed it with them, the purposes of it and it met with the approval of all of the stockholders. There was no special discussion, other

(Testimony of F. M. Roberts.)

than the purpose of it with any one except Rex Swan. Rex Swan was Cashier of the First National Bank at Redmond, in which he owned no stock; he had formerly been bookkeeper of another mill concern in which Mr. Carlson and I were interested and when this was organized, he took some stock in this Company and my discussion with Mr. Swan—I suggested that it would be of advantage to him to become a stockholder of the bank, of which he was the Cashier, since he wasn't on the Board of Directors and he would then be able to go on the Board of Directors and I suggested to him that I would trade him bank stock for his stock in the mill, at the same time telling him that for the first time in the existence of this mill company, the prospects for substantial profits looked good. He said he would rather keep his stock in the mill and it was entirely agreeable to him to have it go into a partnership. I might add this was just (without knowing the date of the beginning of the NRA days) and it looked as though the NRA would enable us to make the mill make money, as it hadn't made it in any amount before.

Q. Now, Mr. Roberts, you mentioned that these persons were associated with you in those two banks. In addition, you own and control certain other banks, where they are also interested with you, do you not, the Banks at Eatonville, Orting and Morton?

A. Well, certain of them are interested, not the whole group. [7]

(Testimony of F. M. Roberts.)

Q. But there are certain members of this group interested with you in various of these institutions?

A. Yes.

Q. Were any written articles of partnership executed by the partners in connection with the organization of this partnership, known as the Seattle Renton Mill Company, on July 1st?

A. No.

Q. Had you been associated in partnerships previously with any of these other persons who are partners in this Company?

Mr. Winter: I object to that as irrelevant and immaterial.

The Court: Overruled.

A. Yes, I had been associated in partnerships with all of them.

Q. May I ask, if you don't mind, that you relate as briefly as possible the various partnerships you have been in and the length of time these persons have been associated in together, whereby no articles of partnership——?

Mr. Winter: (Interrupting) This is an attempt to show a custom, to prove it was done in this case. I think it is immaterial.

The Court: Overruled.

Mr. Winter: Exception.

A. The Bear Creek Timber Company was a partnership in which Mr. Carlson, Mr. Shinstrom, Mr. Swan, my wife and myself were interested and, may I interpose here to say that my wife had some stock in this corporation which was her separate property

(Testimony of F. M. Roberts.)

and I think I didn't enumerate her [8] amongst the stockholders; we were interested in that Company, which was in existence four or five years, made a partnership income tax return, but had then gone out of business.

Q. Did you have written articles of partnership?

A. We had no written articles of partnership. Mr. Weter and I had been law partners through this period of years and we never had any written articles of partnership, though in addition to our law practice we owned considerable amount of real estate, part in his name and part in my name, none of which was in both names. I am interested with them in—and have been for a long time and now am—with Mr. Weter and Mr. Shinstrom, as C. A. Shinstrom Company, a partnership which never had any written articles.

Q. What business do they engage in?

A. Fire insurance. I am interested in a partnership called the Stockholders' Fund, of the First National Bank of Kirkland, in which the partners are the same persons as the stockholders in the Bank but included Mr. Shinstrom, Mrs. Roberts, my father was a partner, and after his death, my sister became, who is the same one here, Mrs. Roberts and myself and there was nothing written to evidence that partnership. There was a similar partnership called the Stockholders' Fund of the First National Bank of Redmond, in which the same persons were interested, which had no written articles of partner-

(Testimony of F. M. Roberts.)

ship and which always made its partnership income tax returns. Mr. Weter and I are interested with G. T. Hagen, at Eatonville, in a partnership known as G. T. Hagen & Company.

Q. In what business? [9]

A. Insurance. I don't think of any others at this moment.

Q. None of those ever had any written articles?

A. Never had, up to the time of this examination, this question, I never had written articles of partnership in any partnership in which I was ever interested.

Q. In connection with these Banks, may I ask, you have just retired as the President of the State Bankers' Association, have you not? A. Yes.

Q. What preparations were made by the Corporation's officers prior to June 30th, 1933, preparatory to actually making the transfer to the partnership?

A. As I said before, we had discussed the matter; it met with the approval of all of the people interested, and I then instructed—for instance, Mr. Dougherty, the bookkeeper at the mill and Mr. Carlson, the Manager, informed them of our intent to make this arrangement and asked that they get the books in shape so that we could accomplish this purpose on the last day of June. I might add that it had been our habit to take off a profit and loss report, semi-annually, on the last of December and, also, on the 30th of June, taking a full inventory,

(Testimony of F. M. Roberts.)

and I made that request in advance so they could have their inventories all up to date and everything ready so that the whole thing could be accomplished on the 30th of June. Then, some two weeks before that, I sent out a written notice to the partners—

Q. (Interrupting) Pardon me, just a moment, before you continue. Mr. Clerk, will you mark these, please? I might say I have prepared copies of the Minutes of the [10] Stockholders' and Trustees' meeting of June 30th, 1933, and of the notice sent to the stockholders. I have the original Minute Book here and I think Counsel had an opportunity to examine it. I would like leave, of course, with the consent of Counsel, to use the copies in lieu of the originals, so not to have to put the Minute Books in evidence.

Mr. Winter: No objection to that procedure, as long as we may have the opportunity to check them, finally.

Q. Showing you Plaintiff's exhibit No. 1 for identification, I will ask what that is a copy of?

A. That is a copy of the notice which was mailed out from my office to the stockholders of the mill company.

Q. That was mailed when?

A. The 15th of June.

Q. There is that designation?

A. Yes, that is the only way I know.

Mr. Shefelman: I offer Plaintiff's exhibit No. 1 in evidence.

(Testimony of F. M. Roberts.)

Mr. Winter: No objection.

The Court: Admitted.

Plaintiff's exhibit No. 1, copy of notice to stockholders, mailed June 15th, last above referred to, admitted in evidence.

PLAINTIFF'S EXHIBIT NO. 1

Bryn Mawr, Washington,
June 15, 1933

To the Stockholders of
the Seattle-Renton Lumber Co.:

You are hereby notified that there will be a special meeting of the stockholders of this corporation held at the mill office at 3 P.M. June 30, 1933 to pass upon the question of the sale of the assets of the corporation to a partnership to be formed to take over the same.

F. M. ROBERTS
Secretary

Copy of above mailed all stockholders of record
June 15, 1933.

F. M. ROBERTS
Secretary

[Endorsed]: Admitted Jan. 23, 1939.

(Testimony of F. M. Roberts.)

Mr. Shefelman: (Read's Plaintiff's exhibit No. 1 to the Court.)

Q. Did you actually have your Trustees' meeting on the 30th of June 1933, Mr. Roberts?

A. Yes. [11]

Q. Will you tell the Court where you first met and what happened?

A. We had first intended to meet out at the mill and then things in the office were fairly busy and Mr. Weter didn't want to be gone.

Q. When you speak of the "office" you mean?

A. Our law office. Mr. Weter didn't want to be gone; it was some question how rapidly we could have the figures together at the mill, so I went out to the mill, I don't know what time of day; I was there, quite a long while, assisting in putting the figures together and getting it in shape and then when we had those figures all in shape, Mr. Carlson and I left the mill and came into the law office, where we actually had the meeting, although the Minutes recite the meeting was at the mill.

Q. You speak of Mr. Carlson, Mr. Roberts, other than the Carlson family, I believe you have already testified that Mr. Weter, who has been associated with you since 1903 in the practice of law, was a member of the partnership—all other persons, as I understand, are your relatives?

A. Yes.

Q. Aside from Jim Carlson, Jim Weter?

A. Yes.

(Testimony of F. M. Roberts.)

Q. Had Mr. Carlson been associated with you in any way prior to 1929, when the Seattle Renton Lumber Company began to operate its mill?

A. Yes, I was interested in another mill in the country and got acquainted with Carlson, at Eatonville, where he ran a shingle mill in the Ohop Valley; this other [12] company I was in wasn't operating successfully. I think in 1922, I wouldn't be too certain, it might have been 1922 or 1923, I asked Mr. Carlson to come down to that mill to take over a part of the management, which he did and in the course of six months, took over the full management of that mill and we operated that mill continuously up until after we had built this mill, for some time after 1929 and, also, we were interested in this Bear Creek Timber Campany, a partnership which was engaged in the logging business.

Q. The name of the mill to which you have reference, he managed for you previously, was the Cottage Lake Lumber Company?

A. It was changed to that name sometime after that; it had been the Getchell Lumber and Shingle Company.

Q. That is located——?

A. (Interrupting) It was located east of Seattle, between Seattle and Duvall.

Q. I have had marked for identification as Plaintiff's exhibit No. 2, what we have prepared as a copy of the Minutes of the Trustees' meeting of that date, which appear in the original Minute Book.

(Testimony of F. M. Roberts.)

Mr. Winter: I have no objection.

Mr. Shefelman: I will offer a copy of the Minutes of the Trustees' meeting of June 30th, 1933, as a true copy of the original Minutes of the meeting.

Mr. Winter: No objection.

The Court: Admitted.

Plaintiff's exhibit No. 2, last above referred to, admitted in evidence. [13]

PLAINTIFF'S EXHIBIT NO. 2

Trustees' Meeting

A meeting of the Trustees of the Seattle Renton Lumber Company was held at the mill office on June 30, 1933 there being present James P. Weter, James C. Carlson and F. M. Roberts. The minutes of the last meeting of the Trustees were read and approved, after which a financial statement of the corporation was presented for the consideration of the Board, the said statement appearing after these minutes in the minute book.

After a discussion of this statement it was the opinion of the Trustees that the corporation should go out of business, and that the mill and business should be taken over by a partnership composed of the present stockholders. It was at first deemed advisable to turn over everything to such a partnership, but after discussion it was decided that the corporation should retain its Accounts Receivable and the following Resolution was then presented:

(Testimony of F. M. Roberts.)

“Resolved that the Seattle Renton Lumber Company sell to a partnership, which will be composed of the same persons who have held stock in the Seattle Renton Lumber Company and which will be known as the Seattle Renton Mill Company, all of its real estate and tangible personal property of every description at the figures the same are now carried upon the books of the corporation, less the depreciation reserve; and that the offer of the said partnership to purchase upon the said terms and to assume the mortgage upon the mill plant in the sum of \$20,000.00 be accepted, and that the President and Secretary of the corporation be authorized to do whatever acts are necessary to complete the said sale. Further, that at the same time said sale is consummated, a dividend be declared of the total amount realized from such sale, towit, \$118,662.56. That of the said amount \$1368.43 represents actual earnings, and will be a dividend in the proper sense of the word, and that the balance be shown as a liquidating dividend, the same being used first to liquidate the paid in surplus, and thereafter on account of capital. That the book entries for the said sale and the declaration of the said dividend shall be as follows:

(Testimony of F. M. Roberts.)

Real Estate	30,000.00
Mill and equipment.....	101,763.64
Mack truck	5,500.00
2nd hand Mack.....	345.00
Ford Coupe	669.00
Boat	1,773.12
Roadway	1,701.07
Office Equipment	580.48

	142,332.31
Less depreciation reserve.....	20,086.92
	<hr/>

Carried fwd. 122,245.39

	Brought fwd. \$122,245.39
Lumber inventory	8,627.23
Log inventory	7,734.94
Supplies Inventory	55.00
	<hr/>

\$138,662.56

Mortgage (assumed by buyers).....	20,000.00
Dividend (undivided profits).....	1,368.43
Surplus (paid in).....	32,500.00
Capital	84,794.13
	<hr/>

138,662.56''

Passage of the Resolution was moved, seconded and unanimously carried.

Thereafter the Treasurer was instructed to pay a 5% tax upon the said dividend, and to report the same as required by law.

On motion the meeting adjourned.

F. M. ROBERTS

Secretary

[Endorsed]: Admitted Jan. 23, 1939.

(Testimony of F. M. Roberts.)

Q. Mr. Roberts, with reference to the statement that the meeting was held at the mill office, I believe you have already testified that, in fact, that two of you met there and you adjourned to our law office in the Northern Life Tower?

A. That is correct.

Q. The mill is situated how far from the office by automobile? A. I suppose eight miles.

Mr. Shefelman: (Reads Plaintiff's exhibit No. 2 to the Court.)

Q. First, with reference to the statement contained herein, Mr. Roberts, as follows: "It was at first deemed advisable to turn over everything to such corporation, but after discussion, it was decided that the corporation should retain its accounts receivable." Will you explain the reason for the change from the arrangement whereby the accounts receivable would have been transferred to the partnership to the arrangement finally made, whereby the accounts receivable were retained by the corporation?

A. Well, in the first place, the accounts receivable represented a sufficient amount to pay the accounts payable and certain notes of the mill aside from the mortgage, so there would be sort of an automatic washout in the course of the next month or two or three but that was why it was possible rather than the reason—now, amongst these accounts receivable were certain accounts which were doubtful whether they were good in whole or in

(Testimony of F. M. Roberts.)

part or whether there would be some shrinkage in them and we felt that if we turned those [14] accounts over to the partnership at their face amount, the partnership would then show a loss on those accounts and we would be subject to criticism by any Income Tax Department for having a loss—really should have been a loss of the corporation—on the other hand, if we felt—if we tried to estimate a discount on them, it would be equally as bad—and in addition to that, there was one account written off at the end of 1932 and it was possible there would be some recoveries in that account and we felt that if there were recoveries in that account, it should be recoveries for the corporation and not for a partnership, which could place no value on it. This was the account of the Bennett Box Factory and everything had been sold except their plant, and seemed to be in the midst of the depression, no market whatever for it, and expense of upkeep.

Q. Do I understand the sum total of your testimony, in response to the last question was to avoid any complaint on the part of the Income Tax Department, you didn't transfer the accounts receivable?

Mr. Winter: I object to the form of the question.

The Court: It is too leading. Objection sustained.

Q. Will you sum up the reason for not transferring the accounts receivable with the tangible assets?

(Testimony of F. M. Roberts.)

A. I think I did sum it up; it was to avoid, as we thought, the criticism on the part of the Income Tax Department but apparently—

Q. Mr. Roberts, upon the conclusion of the trustees' [15] meeting of that day, did you hold a stockholders' meeting? A. Yes.

Mr. Shefelman: I will offer in evidence, as in the case of the Minutes of the trustees' meeting, as Plaintiff's exhibit No. 3, in this case, the Minutes of the stockholders' meeting of June 30th, 1933.

Mr. Winter: No objection.

The Court: Admitted.

Plaintiff's exhibit No. 3, last above mentioned, admitted in evidence.

PLAINTIFF'S EXHIBIT NO. 3

Stockholders' Meeting

Bryn Mawr, Washington
June 30, 1933.

A special meeting of the shareholders of the Seattle-Renton Lumber Co. was held at the mill on the above date, the following stock being personally represented:

C. A. Shinstrom.....	100 shares
James C. Carlson.....	230 shares
F. M. Roberts.....	212 shares
James P. Weter.....	222 shares.

(Testimony of F. M. Roberts.)

The call for the meeting was read, and it was then stated that a quorum was present.

The Secretary then read to the stockholders the minutes of a meeting of the Trustees which had just been held, said minutes setting forth a resolution of the Trustees under which the real estate and all tangible personal property of the mill, a corporation, was to be sold to a partnership composed of the stockholders in the mill, the partners to contribute to the new partnership the dividends received from the mill. After reading the said minutes, it was moved, seconded and carried that the action of the Trustees in selling the mill property and in the declaration of a dividend be approved. The same received the unanimous vote of all stock represented at the meeting.

On motion the meeting adjourned.

F. M. ROBERTS
Secretary

[Endorsed]: Admitted Jan. 23, 1939.

Mr. Shefelman: (Reads Plaintiff's exhibit No. 3 to the Court.)

Q. Did you, on that date, execute any instruments transferring the title to the real or personal property from the corporation to the partnership?

A. We executed a bill of sale of the personal property from the corporation to the partnership. (If you are looking for them, they are in my file, I think.)

(Testimony of F. M. Roberts.)

Q. You have them with you? A. Yes.

Q. Will you be kind enough to let me have them so I can have them marked if you will?

A. (Handing document to Mr. Shefelman.)

Q. Showing you what has been marked for identification Plaintiff's exhibit No. 4, I will ask you what that instrument is, Mr. Roberts?

A. That is a conveyance from the Seattle Lumber Company, the corporation to myself, of the mill site.

Q. Bearing the date, June 30th, 1933? [16]

A. Yes.

Mr. Shefelman: I will offer that in evidence.

Mr. Winter: No objection.

The Court: Admitted.

Plaintiff's Exhibit No. 4, last above referred to, admitted in evidence.

PLAINTIFF'S EXHIBIT No. 4

2881250

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The Grantor, Seattle Renton Lumber Co., a Corporation duly organized and existing under and by virtue of the laws of the State of Washington and duly authorized to do business in the State of Washington, for and in consideration of Forty Thousand Dollars, of which Twenty Thousand Dollars is by the assumption of the hereinafter described mortgage, in hand paid, conveys and warrants to F. M. Roberts the following described Real

(Testimony of F. M. Roberts.)

Estate: Block "B" of Lake Washington Shore Lands as modified in Cause No. 156371 of the Superior Court of King County, Washington, in the County of King, State of Washington; Also Beginning at the intersection of the Easterly line of the Seattle Renton and Southern Right of Way with a line 2 feet South of the North line of Lot 1 in Block 27 of Bryn Mawr, in the County of King and State of Washington, as per map thereof recorded in Volume 5 of Plats, page 58, in the office of the County Auditor of said County; thence Southeasterly along said Easterly line of Seattle Renton and Southern Right of Way to the intersection of the Southerly line of Juniper Street (Keats Avenue) as shown on said plat (now vacated); thence East along the South line of said street to the West margin of Black River Waterway as established in Cause No. 156371 of the Superior Court of King County, Washington; thence North $2^{\circ}40'09.5''$ East along the West margin of said waterway to a point South $88^{\circ}27'28''$ East of the point of beginning; thence North $88^{\circ}27'28''$ West to the point of beginning. Situated in the County of King, State of Washington.

Dated this 30th day of June 1933.

In Witness Whereof, The said Grantor, a corporation, has caused these presents to be subscribed by its President, and its corporate seal to be

(Testimony of F. M. Roberts.)

hereunto affixed and attested by its Secretary, the day and year first above written.

[Seal] SEATTLE RENTON LUMBER
CO.

By JAS. C. CARLSON
Its President.

Attest:

.....
By F. M. ROBERTS
Its Secretary.

State of Washington,
County of King—ss.

On this 30th day of June, A. D. 1933, before me personally appeared James C. Carlson and F. M. Roberts to me known to be the President and Secretary, respectively of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] MIKE COPASS
Notary Public in and for the State of Washington,
residing at Seattle.

(Testimony of F. M. Roberts.)

2881250. Warranty Deed. By Corporation. From Seattle Renton Lumber Co. to F. M. Roberts. Filed for Record at Request of (Mail) Weter, Roberts & Shefelman, 1612 Northern Life Tower.

[Endorsed]: Admitted Jan. 23, 1939.

Q. What date was this instrument actually executed? A. June 30th, 1933.

Q. And that is signed by Mr. Carlson, President, and you as Secretary? A. Yes.

Q. Yourself, individually? A. Yes.

Q. What date was it acknowledged?

A. The same date.

Q. Why was the title to the real property taken in your individual name, Mr. Roberts?

A. Well, at our meeting we discussed how it should be transferred and I made the suggestion it go into Mr. Carlson's name for the benefit of the partnership; he said he thought it ought to go into mine; it was transferred into my name, I taking the title, however, for the benefit of the partnership.

Q. Showing you what is marked as Plaintiff's exhibit No. 5 for identification, what is that?

A. That is a bill of sale from the Seattle Renton Lumber Company to the Seattle Renton Mill Company, a partnership, of the machinery and equipment, trucks, Ford car, office furniture, lumber, logs and supplies at the [17] mill.

Q. Executed on what date?

(Testimony of F. M. Roberts.)

A. The 30th of June 1933.

Q. And delivered on what date?

A. The same day.

Q. Does it bear acknowledgement?

A. Yes.

Q. What date was the instrument acknowledged?

A. Yes.

Q. What date, acknowledged?

A. The same day that it was delivered to me.

Mr. Shefelman: I will offer the instrument in evidence.

The Court: Admitted.

Plaintiff's exhibit No. 5, the instrument just referred to, admitted in evidence.

PLAINTIFF'S EXHIBIT No. 5

Know All Men by These Presents:

That Seattle Renton Lumber Co., a corporation the party of the first part, for and in consideration of the sum of Ninety Eight Thousand Six Hundred Sixty Two and 56/100 Dollars, lawful money of the United States of America to it in hand paid by Seattle Renton Mill Co., a partnership, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, its successors and assigns all machinery and equipment contained in or about the mill building and premises of the grantor at Bryn

(Testimony of F. M. Roberts.)

Mawr, Washington, together with two Mack trucks, one Ford coupe, one power boat "Peacock", office furniture and equipment, and all lumber, logs and supplies on hand at the said mill premises. The intention of this bill of sale is to pass title to all tangible personal property of the vendor, but including no intangible personal property of any nature or description.

To Have and to Hold the same to the said party of the second part, its successors and assigns forever. And the said grantor does for its successors and assigns, covenant and agree to and with the said party of the second part, its successors and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, its successors and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, we have hereunto set our hands and seals the 30 day of June in the year of our Lord one thousand nine hundred and thirty-three.

Signed, Sealed and Delivered in Presence of
[Seal] SEATTLE RENTON LUMBER
CO.

[Seal] By JAS. C. CARLSON
Pres.

[Seal] And By F. M. ROBERTS
Sec.

(Testimony of F. M. Roberts.)

State of Washington,

County of King—ss.

On this 30th day of June, A. D. 1933 before me personally appeared James C. Carlson and F. M. Roberts to me known to be the President and Secretary, respectively, of the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] MIKE COPASS

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Admitted Jan. 23, 1939.

Q. Will you tell me why the bill of sale runs to the Seattle Renton Mill Company, a partnership, while the deed to the real property runs to yourself, individually?

A. Well, we felt that—of course, I think it takes no explanation, why the bill of sale runs to the partnership—the explanation would be why

(Testimony of F. M. Roberts.)

the deed ran to me; we felt we were a closely united and related group and if we had it in the name of the partnership, had the real estate, there might be probate proceedings, which possibly could be avoided in the event of the death of someone.

Q. Showing you what is marked for identification Plaintiff's exhibit No. 6, I will ask you what that instrument is? [18]

A. That is a declaration of trust that I executed at the time in connection with the same transaction.

Q. That was executed on what date?

A. The 30th of June 1933.

Q. And acknowledged on what date?

A. The same day, I feel sure.

Mr. Shefelman: I will offer Plaintiff's exhibit No. 6, in evidence.

Mr. Winter: No objection.

The Court: Admitted.

Plaintiff's exhibit No. 6, the declaration of trust last above referred to, admitted in evidence.

PLAINTIFF'S EXHIBIT No. 6

DECLARATION OF TRUST

I, F. M. Roberts, do hereby acknowledge that I have this day received a conveyance from the Seattle Renton Lumber Co. of the following de-

(Testimony of F. M. Roberts.)

scribed real estate situated in King County, Washington, towit:

Block "B" of Lake Washington Shore Lands as modified in Cause No. 156371 of the Superior Court of King County, in the County of King, State of Washington; Also

Beginning at the intersection of the Easterly line of the Seattle Renton and Southern Right of Way with a line 2 feet South of the North line of Lot 1 in Block 27 of Bryn Mawr, in the County of King, State of Washington, as per map thereof recorded in Volume 5 of Plats, page 58, in the office of the County Auditor of said County; thence Southeasterly along said Easterly line of Seattle Renton and Southern Right of Way to the intersection of the Southerly line of Juniper Street (Keats Avenue) as shown on said plat (now vacated); thence East along the South line of said street to the West margin of Black River Waterway as established in Cause No. 156371 of the Superior Court of King County, Washington; thence North $2^{\circ}40'09.5''$ East along the West margin of said waterway to a point South $88^{\circ}27'28''$ East of the point of beginning; thence North $88^{\circ}27'28''$ West to the point of beginning.

I further acknowledge that I received said conveyance in trust for the following named persons in the following proportions:

(Testimony of F. M. Roberts.)

James C. Carlson.....	230/900
James P. Weter.....	211/ "
C. A. Shinstrom.....	100/ "
R. C. Swan.....	10 "
Estelle Roberts	262/3 "
Helen R. Shinstrom.....	262/3 "
J. M. Roberts.....	19 "
Edith S. Roberts.....	37 "
Ruth Roberts..	1 "
Mary Roberts	1 "
For myself	2372/3 "

I further declare that I have taken said title at the request of the persons interested in said real estate, who are partners as the Seattle Renton Mill Co., for the reason that it would be cumbersome to have the title to said real estate in the names of all of the said persons. I hereby agree to be bound by the decision of the said persons for whom I hold title in trust, as to the handling of the said title, and agree upon request to convey the same to them, or to any other person to whom I shall be directed to make conveyance. I further declare that I have no interest in said property except only the interest as set forth in this Declaration of Trust.

In Witness Whereof, I have hereunto set my hand this 30th day of June, 1933.

[Seal] F. M. ROBERTS

State of Washington
County of King—ss.

This Certifies that on this 30th day of June, 1933, personally appeared before me F. M. Roberts,

(Testimony of F. M. Roberts.)

to me known to be the individual who executed the foregoing instrument, and acknowledged same as his free act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal the day and year in this certificate first above written.

[Seal] MIKE COPASS

Notary Public in and for the State of Washington,
residing at Seattle

[Endorsed]: Admitted Jan. 23, 1939.

A. I would like to add that these were worked out ahead of the 30th.

Q. And simply signed and delivered on that day?

A. I couldn't tell you whether the typing was done on that day or before—I know they were all worked out, the whole thing, in advance.

Mr. Shefelman: I would like to read, without including the description, the pertinent part of this declaration of trust. (Reads from Plaintiff's exhibit No. 6 to the Court.)

Q. I notice, Mr. Roberts, that on each of these instruments the Notary Public is Mike Copass, who is Mr. Copass?

A. He is a lawyer in our office, employe of the office.

Q. He is still with us at this time?

A. Yes.

Q. And was on June 30th, 1933?

A. Yes. [19]

(Testimony of F. M. Roberts.)

Q. Your declaration of trust has never been recorded, has it, Mr. Roberts? A. No.

Q. And that is also true of the bill of sale?

A. That is true.

Q. I notice, however, the King County Auditor's stamp mark showing the recording of the warranty deed to yourself as of January 2d, 1936, will you explain, if you will, how the deed happened to be recorded?

A. Well, that was after all of this controversy arose and we had been compelled to pay income tax for the year 1933,—I guess by that time paid a corporate income tax for the year 1939, during which year the Government still maintained that we were operating as a corporation and I think we had then had our review, I don't know whether we had or not, for the succeeding year, but it became evident that they were adhering to the position, so it seemed advisable to take certain steps to cure what were their objections, and at that time we even changed the form of our partnership and this was recorded at that time.

Q. Their objection being what, with reference to the matter of recording?

A. The fact that the instruments had not gone on record.

Q. What effect did they say that had upon the existence of the partnership?

Mr. Winter: If the Court please——

The Court: Objection sustained, until it is stated who raised the objection.

(Testimony of F. M. Roberts.)

Q. Did you, at the time of the meeting, which was held [20] on June 30th and when these instruments were executed, have anybody at the mill prepare a complete financial statement and profit and loss statement of the corporation as of June 30th, 1933?

A. Yes, Mr. Dougherty, the bookkeeper.

Q. Where do you keep that?

A. A copy was in the Minute Book; it has always been loose in the Minute Book; there are other copies at the mill.

Q. Showing you what is marked for identification, Plaintiff's exhibit No. 7, I will ask you what that is?

A. Well, that is a full statement of the financial situation of the Company at that time; the first page, profit and loss statement for the six months ending June 30th.

Mr. Winter: It appears from the witness's own testimony he had someone else prepare it.

Mr. Shefelman: He is Secretary of the corporation.

The Court: It was prepared at that time, you saw it?

A. I assisted, as a matter of fact, in its preparation; Mr. Dougherty was, primarily, responsible.

Mr. Winter: I didn't so understand.

The Court: Is it offered?

Mr. Shefelman: I will offer it at this time.

The Court: Admitted.

Plaintiff's exhibit No. 7, the statement just referred to, admitted in evidence.

(Testimony of F. M. Roberts.)

PLAINTIFF'S EXHIBIT No. 7

Telephone-Seattle Exchange
RAinier 5990

James C. Carlson.
Manager

SEATTLE-RENTON LUMBER COMPANY
Manufacturers of Douglas Fir Lumber
Bryn Mawr, Washington

PROFIT & LOSS STATEMENT

June 30, 1933

	Losses	Gain	Assets	Liab.
First Natl. Bank of Kirkland.....			831.49	
Cash.....			344.75	
Accts. Rec.....			15,682.88	
Notes Rec. Norman & Booth.....			1,109.50	
Notes Rec.....			700.00	
Inventory—Lumber 6/30/33.....			8,627.23	
Inventory—Logs 6/30/33.....			7,734.94	
Inventory—Supplies 6/30/33.....			55.00	
Boat Acct. "Peacock",.....			1,773.12	
Real Estate.....			30,000.00	
Plant & Equip.....			101,763.64	
Office Equip.....			580.48	
Roadway.....			1,701.07	

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 7 (Continued)

PROFIT & LOSS STATEMENT (Continued)

	Losses	Gain	Assets	Liab.
New Mack Truck.....			5,500.00	
Old Mack Truck.....		345.00		
Ford Coupe.....		669.00		
Lumber Sales.....	54,423.87			
Hog Fuel Sales.....		1,644.50		
Wood Sales.....		2,043.40		
Discount Rec.....		728.22		
Cabin Rentals.....		671.16		
Recovery for Bad Accounts.....		86.95		
Depreciation Reserve.....				
Accts. Payable—Current Bills.....			2,462.75	
Bills Payable—Notes.....			31,000.00	
Capital Stock.....			90,000.00	
Surplus.....			32,500.00	
Logs Purchased.....			30,479.38	
Wages—Mill Labor.....			9,733.65	
Salaries.....			2,024.50	
Ind. Ins. & Med. Aid.....			372.23	
General Tele. & Office Exp.....			203.60	
Repairs & Mill Operation.....			3,415.53	

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 7 (Continued)

PROFIT & LOSS STATEMENT (Continued)

	Losses	Gain	Assets	Liab.
Power & Light.....	2,488.72			
Insurance.....	1,039.17			
Taxes.....	472.98			
Interest Paid.....	826.14			
Discount Allowed.....	913.41			
License.....	105.50			
Misc. Incidentals.....	13.28			
	<hr/>	<hr/>	<hr/>	<hr/>
	52,088.09	59,598.10	177,418.10	172,663.88
			2,755.79	
Profit & Loss 1932.....				
Depreciation 1933, 6 Mos.....	3,385.79			
Gain, 6 Mos. 1933.....	4,124.22			7,510.01
	<hr/>	<hr/>	<hr/>	<hr/>
	59,598.10	59,598.10	180,173.89	180,173.89

Plaintiff's Exhibit No. 7 (Continued)

Telephone-Seattle Exchange
RAmier 5990

James C. Carlson
Manager

SEATTLE-RENTON LUMBER COMPANY
Manufacturers of Douglas Fir Lumber

Bryn Mawr, Washington

LOGS CUT & LUMBER SOLD
6 Mos., January 1 to June 30, 1933

	Lumber	Logs
January	1,160,931'	722,695'
February	1,051,322'	376,510'
March	701,024'	819,230'
April	866,856'	628,744'
May	780,506'	622,850'
June	1,058,967'	1,125,406'
	<hr/>	<hr/>
	5,619,606'	Total 4,335,435'
Loss Purchases	169,956'	o Inv 1/1/33 375,000'
	<hr/>	<hr/>
	5,499,650'	4,710,435'

(Testimony of F. M. Roberts.)

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 7 (Continued)

LOGS CUT & LUMBER SOLD (Continued)

Lumber	Logs
Deduct Inv. 1/1/33..... 1,267,702'	4,181,948'
	<hr/>
Add Inv. 6/30/33.....	833,549'
	<hr/>
Deduct Logs sawed	5,015,497'
	<hr/>
Overrun 33.06%.....	1,246,297'
	<hr/>
	3,769,200' Logs Sawed 6 Mos.

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 7 (Continued)

Telephone-Seattle Exchange
RAinier 5990James C. Carlson
Manager

SEATTLE-RENTON LUMBER COMPANY

Manufacturers of Douglas Fir Lumber
Bryn Mawr, Washington

ACCOUNTS RECEIVABLE

June 30, 1933

Associated Oil Co.....	\$ 30.72
Axelson Box Co.....	348.14
Blackstoek Lumber Co.....	67.10
Booth Bros.	813.59
Buckinger, J. P.....	1.56
Brace Lumber Co.....	278.97
Colby & Diekinson.....	1,452.65
Columbia Lumber Co.....	2,870.23
Cottage Lake Lumber Co.....	621.30
Alex Cugini	168.77
Caseade Maehy. Co.....	27.26
John Dower Lumber Co.....	879.41
Elliott Bay Lumber Co.....	2,370.65
Employees	26.62
Foster Lumber Co.....	194.11
Home Oil Co.....	26.99
Jennings, H. L.....	65.27
King County	19.01
Lakewood Boat House.....	65.00
Lockwood Lumber Co.....	1,920.03
Meade Lumber Co.....	16.00
Miller, Ed	1.14
Nettleton Lumber Co.....	27.13
Norman Fuel Co.....	82.50
Pacific Lumber Agency.....	256.50
Pacific Car & Fdry. Co.....	122.28
Puget Sound Lbr. Mfg. Co.....	21.88
Puget Sound Mehy. Depot.....	22.74
Rich Lumber Co.....	1,527.41

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 7 (Continued)

Savage Lumber & Mfg. Co.....	\$ 729.11
Snyder, C. C.....	33.60
Sunset Tug & Barge Co.....	28.56
Triangle Fuel Co.....	228.96
West Coast Fuel Co.....	9.00
Wire Rope Mfg. & Equip. Co.....	128.69
Bal. per Ledger	\$15,682.88
	<hr/>
	\$15,682.88
	\$15,682.88

ACCOUNTS PAYABLE

Accounts Payable—Current Bills.....	\$ 1,294.65
Ind. Ins. & Med. Aid.....	131.34
Pay Roll—Mill Labor.....	1,036.76
Bal. per Ledger	2,462.75

Telephone-Seattle Exchange
RAINIER 5990

James C. Carlson
Manager

SEATTLE-BENTON LUMBER COMPANY

Manufacturers of Douglas Fir Lumber

Bryn Mawr, Washington

TRIAL BALANCE

June 30, 1933

	Debits	Credits
First Natl. Bank of Kirkland.....	\$ 831.49	
Cash	344.75	
Accounts Rec.	15,682.88	
Notes Receivable, Booth & Norman....	1,109.50	
Notes Receivable, J. C. C.....	700.00	
Inventory, Lumber, 6/30/33.....	8,627.23	
Inventory, Logs, 6/30/33.....	7,734.94	
Inventory Supplies, 6/30/33.....	55.00	
Boat Acct. "Peacock".....	1,773.12	
Real Estate	30,000.00	
Plant & Equip.....	101,763.64	
Office Equip.	580.48	

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 7 (Continued)

	Debits	Credits
Roadway	\$ 1,701.07	
New Mack	5,500.00	
Old Mack	345.00	
Ford Coupe	669.00	
Lumber Sales		54,423.87
Hog Fuel Sales.....		1,644.50
Wood Sales		2,043.40
Recovery for Bad Accounts.....		86.95
Discount Received		728.22
Cabin Rentals		671.16
Accounts Payable—Current Bills.....		2,462.75
Bills Payable		31,000.00
Capital Stock		90,000.00
Surplus		32,500.00
Depreciation Reserve, 1932.....		16,701.13
Logs Purchased	30,479.38	
Wages—Mill Labor	9,733.65	
Salaries	2,024.50	
Ind. Ins. & Med. Aid.....	372.23	
General, Telephone & Office Expence..	203.60	
Repairs & Mill Operation.....	3,415.53	
Power & Light.....	2,488.72	
Insurance	1,039.17	
Taxes	472.98	
Interest Paid	826.14	
Discount Allowed	913.41	
Licenses, Trucks & Ford.....	105.50	
Misc. Incidentals	13.28	
Profit & Loss.....	2,755.79	
Depreciation, 1933—6 Mos.....	3,385.79	
Reserve for Depreciation.....		3,385.79
	<hr/> \$235,647.77	<hr/> 235,647.77

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 7 (Continued)

Telephone-Seattle Exchange
RAInier 5990

James C. Carlson
Manager

SEATTLE-RENTON LUMBER COMPANY
Manufacturers of Douglas Fir Lumber
Bryn Mawr, Washington

June 30, 1933

**STATEMENT OF COSTS OF MANUFACTURE
& RECEIPTS**
6 Mos. ending June 30

Income

	Per M
Lumber Sales	\$54,423.87
Hog Fuel Sales.....	1,644.50
Wood Sales	2,043.40
Discount Received	728.22
Cabin Rentals	671.16
Recovery for Bad Accts.....	86.95
	<hr/>
	59,598.10
	<hr/>

Expense

Logs Purchased	\$30,479.38	6.08
Wages—Mill Labor	9,733.65	1.94
Salaries	2,024.50	.40
Ind. Ins. & Med. Aid.....	372.23	.07
General & Office Expense.....	203.60	.04
Repairs & Mill Operation.....	3,415.53	.68
Power & Light.....	2,488.72	.50
Insurance	1,039.17	.21
Taxes	472.98	.10
Interest Paid	826.14	.16

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 7 (Continued)

Expense		Per M
Discount Allowed	\$ 913.41	.18
License	105.50	.02
Misc. Incidentals	13.28	—
Depreciation, 6 Mos. 1933.....	3,385.79	.68
	55,473.88	11.06
Gain, 6 Mos. 1933.....	4,124.22	.82
	59,598.10	11.88

[Endorsed]: Admitted Jan. 23, 1939.

Mr. Winter: May I ask a few questions on the exhibit of the witness? [21]

Mr. Shefelman: No objection.

Cross Examination

By Mr. Winter:

Q. Did you prepare this prior to June 30th, 1933?

A. No, it was finally closed on June 30th, instructions were the books were to be gotten together so it would be closed as a last minute proposition.

Q. When was it prepared? A. June 30th.

Q. It was finally prepared——?

A. (Interrupting) I don't think I had it in type-written form at that time, but we had the figures altogether, I presume the actual typed sheet didn't reach me until another day or two.

(Testimony of F. M. Roberts.)

Mr. Winter: I object to this as irrelevant and immaterial, prepared after June 30th, the figures, he might have had the figures there, some other figures, this wasn't prepared until after; it is an attempt to show as to the balance as to that date; if it is only for that purpose, what the books would show—

The Court: (Interrupting) Overruled.

Mr. Winter: Exception.

The Court: Allowed.

The books are available for Mr. Winter's examination?

Mr. Shefelman: We brought them all into Court, they are all here.

Mr. Winter: We don't contend that this wouldn't be a balance sheet as of June 30th, of the [22] books, as to the figures, the only objection I was making it was prepared after June 30th.

Mr. Shefelman: I don't think you quite understood the witness's answer, Mr. Winter, as perhaps I didn't and I will ask Mr. Roberts—

Direct Examination
(Continued)

By Mr. Shefelman:

Q. You have heard Mr. Winter's statement this was prepared after June 30th, 1933, will you tell us just when it was prepared?

A. Well, the figures, in pen or pencil shape, were prepared there on June 30th, 1933, but the typing wasn't done until the succeeding two or three days.

(Testimony of F. M. Roberts.)

Q. The first page of this contains your profit and loss statement, does it not, Mr. Roberts?

A. Yes.

Q. And your second, shows logs cut and lumber sold during the first six months, 1933?

A. Yes.

Q. Third, your accounts receivable?

A. And payable.

Q. What was the total amount of the accounts receivable and payable of the corporation as of June 30th, 1933?

A. Accounts receivable, \$15,682.88; the accounts payable, including accrued labor and industrial insurance were \$2,462.75. I think I should add, however, that there were bills payable, that is notes payable at that time of the \$20,000.00 mortgage, which the partnership assumed, an additional \$10,000.00 of notes, so that the [23] total debts remaining with the corporation would have been \$12,462.75, against accounts receivable of \$15,682.88.

Mr. Winter: Was that \$10,000.00 or \$11,000.00, notes payable in addition to mortgages payable?

A. \$11,000.00, yes, and that, of course, changes my total payables to \$13,462.75.

Q. Against \$15,000.00 receivables?

A. Yes, I looked at the real estate figure instead of the bills payable.

Q. You speak of notes payable, \$11,000.00, whom was that owed to?

(Testimony of F. M. Roberts.)

A. Well, without seeing the book, I couldn't give you the exact distribution of it.

Q. In general, as nearly as you can recall?

A. As nearly as I recall, was a note payable, First National Bank at Kirkland, note payable to the Orting State Bank of which I am President, a note payable to the daughter of the Cashier of the Orting State Bank and I think the balance of it was payable to me or to Mr. Weter and me in the office.

The Court: The trial will be interrupted at this point and resumed at 2:00 o'clock this afternoon, and Court is at recess until that time.

(Adjournment) [24]

Monday Afternoon Session
January 23d, 1939
2:00 o'Clock

All present and proceedings continued as follows:

F. M. ROBERTS

resumes the stand.

Direct Examination
(Continued)

By Mr. Shefelman:

Q. Following the change of June 30th, 1933, Mr. Roberts, was any change made in any bank

(Testimony of F. M. Roberts.)

account or any new bank account opened for the partnership?

A. A new bank account opened for the partnership, no change in the old one.

Q. Where?

A. First National Bank at Kirkland.

Q. You are now and were then, also, President of that Bank? A. Yes.

Q. Have you procured from the Bank any signature cards pertaining to the account of the partnership?

A. I have. (Handing to Mr. Shefelman, cards.)

Q. Had the lumber company had its account with the Kirkland Bank? It is also a corporation?

A. Yes.

Q. And signature cards had been filed from time to time by the corporation, I judge?

A. Yes. [25]

Q. Showing you what has been marked for identification Plaintiff's exhibit No. 8, what is that?

Mr. Winter: (Interrupting) There is no objection to the introduction of those signature cards into evidence, to save time.

Mr. Shefelman: Plaintiff's exhibit No. 8 is the signature card, of the Seattle Renton Company with the First National Bank, dated August 16th, 1932.

The Court: Admitted.

Plaintiff's exhibit No. 8, last above referred to, admitted in evidence.

(Testimony of F. M. Roberts.)

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PLAINTIFF'S EXHIBIT No. 8

Below please find signature (s) which you will recognize in payment of funds or the transaction of other business on my (or our) account with The First National Bank of Kirkland, Kirkland, Wash:

Seattle-Renton Lumber Co.

Signature of F. M. Roberts, Secy. or Jas. C. Carlson, Pres. or V. Dougherty, Treas.

Address. Introduced by.

Date Aug. 16, 1932.

[Endorsed]: Admitted Jan. 23, 1939.
F. M. Roberts

Mr. Shefelman: May I show that shows the authorized signatures of F. M. Roberts, Secretary, or James C. Carlson, President, or V. Dougherty, and underneath the word "Treasurer."

I think I should offer an explanation as to "Treasurer." Mr. Dougherty is not the Treasurer and that is in my writing, both the words "Secretary, President and Treasurer" on that card, in my writing, I don't know anything about when I wrote them. We contemplated Mr. Dougherty, one time, buying stock, and being made Treasurer. That is his signature on it, but he was never made treasurer.

Q. It is his signature on the card?

A. Yes.

(Testimony of F. M. Roberts.)

Q. Has his signature on the checks, been on them? A. Yes.

Q. What official position does he hold with the corporation?

A. Simply bookkeeper at the mill, no corporate office. [26]

Mr. Shefelman: I shall offer in evidence as Plaintiff's exhibit No. 9 a signature card of the Seattle Renton Mill Company with the First National Bank of Kirkland, dated July 3d, 1933.

The Court: Admitted.

Plaintiff's exhibit No. 9, the signature card last above referred to, admitted in evidence.

PLAINTIFF'S EXHIBIT No. 9

Below please find signature (s) which you will recognize in payment of funds or the transaction of other business on my (or our) account with The First National Bank of Kirkland, Kirkland, Wash.

Seattle Renton Mill Co.

Signature of By Jas. C. Carlson or By F. M. Roberts or By V. Dougherty.

Address Bryn Mawr, Wn.

Introduced by

Date Jul. 3, 1933.

Seattle Renton Mill Co.

[Endorsed]: Admitted Jan. 23, 1939.

(Testimony of F. M. Roberts.)

Q. The signature card I just have referred to of the partnership shows that signature are to be on it, by James C. Carlson, no corporate office designated, or F. M. Roberts, or V. Dougherty, without any corporate designation whatever. That is dated July 3, 1933. Mr. Roberts, did the persons at the mill take any steps immediately following this change of June 30th, 1933, to change the name from the Seattle Renton Lumber Company to the Seattle Mill Company on any signs or stationery or anything?

A. Yes, there was a large sign on the mill which was repainted, I think, within a very few days afterwards, I think there were signs on the trucks and car or truck and car, I have forgotten whether two then, which were painted over and the new name put on; we got a rubber stamp, I think, within a day or two, perhaps even had it then, in which the sales' slips—a rubber stamp that made a bar through "lumber" and printed "Mill" over, or above, it, and a similar rubber stamp used on the stationery until new was printed.

Q. You stated this morning that the corporation owed some money on notes outstanding on June 30th, 1933. Do you [27] know now to whom that money was owed?

A. I gave the names in my testimony this morning. I looked at the book afterwards, I omitted the First National Bank at Redmond; otherwise, I was correct.

(Testimony of F. M. Roberts.)

Q. The persons to whom the money was owed were the Banks at Redmond and Kirkland—that is the corporation owed this money? A. Yes.

Q. Who else?

A. The Orting State Bank, Virginia Stone and to myself.

Q. Briefly, you are the President of each of those three banks? A. Yes.

Q. The other persons associated, likewise connected with one of the banks?

A. Virginia Stone is the daughter of the Vice President of the Bank, he knew about this change, I told him about it.

Mr. Winter: That is the only people you owed money to?

Q. On notes, you had some accounts payable, at that time, \$1200.00?

A. It is my impression, around \$2400.00 or \$2500.00.

Q. Were those persons creditors in the sense the corporation would owe them money for any period of time?

A. No, the corporation had always discounted all its bills on the 10th of the month, following the date of purchase. These accounts, \$1,000.00 odd dollars, was labor and, I think, roughly, \$1200.00 or \$1300.00 supply firms. [28]

Q. Those accounts payable were paid up within—?

A. (Interrupting) Within ten days, paid on the

(Testimony of F. M. Roberts.)

10th, that was always the custom, I know, at this time.

Q. Has your mill, either run by the corporation or partnership, done a credit business, on a credit basis? A. Not on its purchases.

Q. That is, you have sold——?

A. (Interrupting) Sold on credit, not bought, excepting just waiting the first of the month bill.

Q. You have taken your cash discounts within 10 days?

A. Always, through all the time.

Q. Has anybody except the partnership operated the mill since June 30th, 1933?

A. No one else.

Q. Has the corporation engaged in any business since June 1933 other than liquidating its accounts? A. That is all.

Q. Did the corporation assign this \$20,000.00 note and mortgage, which was still in existence June 30th, 1933?

A. To the best of my recollection, they did.

Q. That was a mortgage on the real estate?

A. Pure money mortgage on what was then a vacant tract of ground.

Q. Which the partnership assumed?

A. Yes.

Q. The mortgagee didn't sign a release?

A. No, he didn't release the corporation.

Mr. Shefelman: That is all, if the Court please.

(Testimony of F. M. Roberts.)

Cross Examination

By Mr. Winter:

Q. Mr. Roberts, was there any necessity for changing the form of the organization of the corporation to a partnership except to avoid, as you say, income tax on the corporate earnings?

A. That was the purpose.

Q. You had no other reason for doing it?

A. No reason.

Q. Who was the active manager of the corporation prior to June 30th, 1933?

A. Mr. Carlson.

Q. He was paid a salary? A. Yes.

Q. Did he receive a salary from the socalled partnership after June 30th, 1933?

A. Yes, he was paid.

Q. Was that salary, approximately, the same salary paid after? A. Yes.

Q. And he was still active manager?

A. Yes.

Q. Mr. Dougherty was auditor of the Company prior to June 30th, 1933? A. Yes.

Q. He still continued to be the auditor, signed checks, as he did before, except it was on a different blank check, you said?

A. Except he signed a different name, partnership name, instead of corporation name. [30]

Q. In all cases, did he sign the partnership check? A. Yes, corporation, its bills.

(Testimony of F. M. Roberts.)

Q. Those accounts payable were in ten days after June 30th?

A. Yes, might have been two or three may have hung over, over some dispute or other, I don't think any did, of course he wrote checks that paid those notes.

Q. Wrote checks on the corporate account which was in your bank of which you were President?

A. Yes.

Q. And the account was also kept in your bank under the socalled partnership? A. Yes.

Q. And he still continued to sign them. Did you have occasion to print any new checks, Mr. Roberts? A. Not for some months.

Q. When did you, if you did, order the printing of the checks?

A. I don't know when it was, I know at the mill they ordered some checks, I think it was three months afterwards, something like that.

Q. Now, with the exception of the mere change in name, striking out the word "Lumber" and inserting or putting a bar across the word "Lumber" and putting "Mill" and changing "Lumber" and "Mill" on the plant, what other changes in the organization of the corporation was made — there wasn't any, was there?

A. Well, I don't think of any.

Q. The corporation went on the same?

A. The corporation existed. [31]

Q. It would have been possible, in your opinion,

(Testimony of F. M. Roberts.)

to have reconveyed upon a few days' notice—the socalled partners having agreed, back to the corporation, would it not?

A. The partnership could have sold the mill to the corporation; that wouldn't have had the effect of releasing us from liabilities.

Q. Releasing you from any liability the socalled partnership might have incurred—?

A. (Interrupting) It wouldn't release us.

Q. If you hadn't incurred any obligations, there wouldn't be any liability, would there?

A. No, not if we had conveyed the same day but we incurred a liability the succeeding day.

Q. You were discounting bills in ten days after June 30th, were you not?

A. Yes, we bought our July purchases and then discounted those bills on the 10th of August by check of the partnership.

Q. Did you notify any credit agencies or any of your customers by letter or general letter that the corporation had sold its assets to a partnership?

A. No, there was no general letter went out.

Q. I think you said you did not discuss the formation of the socalled partnership with the minors who were the record owners of stock in the corporation, did you?

A. No, I did not discuss it with any of Mr. Carlson's family except himself.

Q. Did you discuss it with your wife, do you know? A. I did. [32]

(Testimony of F. M. Roberts.)

Q. Who were the stockholders, by the way, of the corporation on June 30th, 1933?

A. Well, I have given them once, I may forget one when I give them again, but, Mr. Carlson, his wife and two—

Q. (Interrupting) Which Carlson was that?

A. James C.

Q. How many shares of stock did he own, as you recall?

A. I wouldn't know except as I went over it with you at the close, I wouldn't trust my recollection, 900 shares from memory, but he owned, as I remember 215, I think that is right.

Q. Mr. Carlson, in the trust agreement there it shows—in the declaration of trust, I should say, it shows the respective interests in the socalled partnership as of J. C. Carlson, 230/900's?

A. Yes, that included the 15 shares which had been out, and his wife and two children, which I had owned myself, he had paid for.

Q. J. C. Carlson, President and Manager, was the stockholder of 215 shares at the time of June 30th?

A. There were 215 shares which stood in his name.

Q. Of record? A. Yes.

Q. Ida, wife of J. C., 5 shares?

A. That is right.

Q. Esther Marian, minor daughter, 5 shares?

A. Yes.

(Testimony of F. M. Roberts.)

Q. Margaret Carlson? A. Yes.

Q. On the trust agreement you acknowledge and received [33] conveyance of trust for J. C. Carlson 230/900's, that includes all that stock?

A. All that stock which he said he was taking over.

Q. And you, as Secretary and Treasurer, you had 211 shares of record?

A. That is approximately it, I wouldn't be sure of my number, I think there are some odd thirds on the end of mine.

Q. Yes, you are right, Mr. Roberts: J. P. Weter had 211 shares? A. Yes.

Q. And C. A. Shinstrom, 100 shares?

A. Yes.

Q. Estate of F. W. Roberts, 80 shares?

A. Yes, I had supposed that that was divided into thirds there, if it wasn't—that went in thirds to Mrs. Shinstrom, Estelle Roberts and myself; I don't remember the date, it wasn't long after my father's death, whether that declaration showed his estate or each of us for thirds—

Mr. Shefelman (Interrupting) Mr. Winter, are you supposed to be reading what the declaration of trust shows?

Mr. Winter: No, I am reading the list of the stockholders as of June 30th, 1933.

Q. When did your father die, Mr. Roberts?

A. I think it was September 1932.

Q. And when was his estate probated?

(Testimony of F. M. Roberts.)

A. Yes.

Q. And you say you, Stella Roberts and Helen Shinstrom? [34] A. Yes.

Q. Were you the beneficiary of one third of the estate?

A. One third of the residuum of the estate.

Q. Had the estate been probated prior to June 30th, 1933? A. Yes.

Q. The stock had been distributed to you?

A. There never was a decree of distribution in the estate, it was a non intervention will.

Q. It had never been transferred on the records of the corporation from the estate, had it?

A. I don't know, it was transferred subsequently, if it hadn't been then, I thought it had then—I think it had then been transferred, though I am not sure.

Q. You don't have the stock records here?

A. No, I don't.

Mr. Shefelman: There is no secret about the stock.

Q. Edith S. Roberts, stockholder, 37 shares, is that right?

A. I imagine so, I am not certain as to her exact holdings.

Q. Well, if that was the amount of the interest, 37/900's shown in the declaration of trust, that would be true? A. Yes.

Q. That is what is shown in the declaration of trust. James P. Weter, 211 shares, he was owner of 211 shares in the corporation? A. Yes.

(Testimony of F. M. Roberts.)

Q. Rex C. Swan, is that? A. That is it.

Q. 10 shares. [35]

A. That is my recollection.

Q. C. A. Shinstrom 100 shares? A. Yes.

Q. Ruth Roberts 1 share? A. Yes.

Q. Who is Ruth Roberts?

A. My daughter.

Q. How old was Ruth June 30th, 1933, was she of age?

A. She was of age, I can't tell you for certain.

Q. Did you discuss the organization of the partnership with Ruth Roberts? A. Yes.

Q. With your daughter?

A. Yes. If you will permit me? Both of them, I have tried to teach my children something of business and what is done and I have taken great pains with the interests they had to explain things to them.

Q. Who is J. M. Roberts? A. My son.

Q. How old is he? A. Of age.

Q. All three of your children were of age, June 30th, 1933?

A. I think Mary was but she is pretty close to the line, I wouldn't be absolutely certain.

Q. I think you said that you had no written articles of incorporation? A. None.

Mr. Shefelman: Is that articles of incorporation? [36]

Mr. Winter: Articles of partnership.

A. I answered it as you meant it.

(Testimony of F. M. Roberts.)

Q. You testified something about the Bear Creek Corporation? A. Partnership.

Q. Was it ever a corporation? A. No.

Q. How about the corporation of you and Mr. Weter, as a law partnership, that was never a corporation?

A. No, that was a partnership.

Q. How about that partnership you and Mr. Shinstrom and Mr. Roberts had?

A. Mr. Weter.

Q. Mr. Weter and Mr. Shinstrom?

A. Partnership.

Q. As a matter of fact, all partnerships?

A. Partnerships, all I said, I am interested in corporations, too.

Q. Did any of those corporations ever sell their assets to the socalled partnership? A. No.

Q. Your arrangements were a partnership to begin with? A. Yes.

Q. I think I asked you, did the corporation ever send out any notice to any of the creditors, such as they were, outside of the stockholders, of any change of partnership? A. No written notice.

Q. No written notice?

A. No. A financial statement was furnished to the [37] First National Bank of Kirkland, where the business was done and credit information had usually been gotten from the Seattle First National Bank with whom all of our banks and Mr. Weter and I, as a partnership, did business and on in-

(Testimony of F. M. Roberts.)

quiries, we had, we either referred them there or were referred to me and I gave the information.

Q. Did you ever file a notice of, or affidavit of doing business under an assumed name—Section 9976 to 9980, of Remington's Revised Statutes of Washington,—with the County Clerk? A. No.

Q. You contend the partnership was doing business under an assumed name of "Seattle Mill Company"? A. That is correct, it was.

Q. I think you stated, Mr. Roberts, that you had a rubber stamp putting a bar across the "Lumber" and stamping the word "Mill" in your stationery, after June 30th, 1933,—was that immediately after or within two or three days?

A. Well, I don't know just when it was done but it would be my guess it was almost immediately but I may be wrong, but I think it was right away.

Q. You had some new checks printed about November 1933, didn't you? A. Yes.

Q. And on these new checks there were printed "Seattle Renton Mill Company" is that right?

Mr. Shefelman: Will you have that marked for identification if you have the witness testify regarding it? We would like to have it marked. [38]

Mr. Winter: All right.

Q. Now, I will show you, Mr. Roberts, what has been marked for identification Defendant's exhibit 1-A and ask you whether or not that represents—I am not particularly interested in the payee of the

(Testimony of F. M. Roberts.)

check, but I am going to ask you whether that represents the form of check which you had printed and used sometime in November 1933?

A. Yes.

Q. You will notice down in the righthand corner, the words "President" and "Treasurer", and signed, what appears to be V. Dougherty, is that the auditor who you say was authorized to sign checks on behalf of the socalled partnership?

A. Yes.

Q. Was he President or Treasurer of the——?

A. (Interrupting) No, there was no President or Treasurer.

Q. I believe you stated that the word "Treasurer" on the signature card was in error because Mr. Dougherty never was Treasurer of the corporation, is that right? A. Correct.

Q. So, therefore, he wouldn't be authorized to sign as Treasurer even on the corporate checks issued prior to June 30th, 1933?

A. No, he was authorized to sign without designation.

Q. Did he sign, would you say, in the same manner, except for the difference of the "Seattle Renton Mill Company" and on the other checks "Seattle Lumber Company"?

A. That is true, he continued to do so, both kinds of checks. [39]

Q. Did you use all the checks which you had printed, printed on that form you have, Defendant's exhibit A-1?

(Testimony of F. M. Roberts.)

A. I don't know, I didn't have anything much to do with that part of the business.

Q. I will ask you to look through your——?

A. (Interrupting) I know they used them for a long time, for all I know are still using them, I think they bought quite a lot of these.

Q. The majority of the socalled partners were inactive in this corporation's affairs, were they not?

A. In the partnership affairs?

Q. Yes? A. Yes.

Q. And, also, likewise, inactive in the corporation affairs? A. Yes.

Q. Mr. Carlson has been General Manager down there and has continued to draw approximately the same salary he drew as a corporation?

A. Yes.

Q. Outside of these things you have mentioned, the socalled partnership was operated along practically the same as the corporation except for the change in name, the execution of these instruments, which weren't recorded?

A. Well, I think every corporation and every partnership operates the same except as a corporation, they have corporate minutes and annual elections and one thing and another.

Q. I mean by that, Mr. Roberts, that you used the same [40] records by just continuing on with the same covers but cancelled out the entries and started new entries as a partnership?

A. Well, we used a looseleaf system of book-

(Testimony of F. M. Roberts.)

keeping and looseleaf system and, I guess, they probably were put away in the same covers, I think there are two indices in the same cover, one A to Z for the partnership, one A to Z for the corporation.

Q. The books continue right on, after beginning June 30th of the partnership, the same binders?

A. They don't continue on, the corporate books continue on and a new set of books for the partnership, which happened to be in that same binder, but they could be taken out and put in another binder, today or any day; then there is a reserve binder out of which ledger pages are taken and put in, the big book, which I think has them all together in the same binder, they might as well have been in a box.

Q. Well, your closing balance of your partnership was carried right on as the opening balance of your partnership, was it not?

A. No, sir.

Q. You say it was not? A. It was not.

Q. Would the closing balance of your depreciation reserve, was that carried as your opening balance depreciation reserve on your partnership?

A. It was.

Q. And it was right in the same binder, follows right after in the same books? [41]

A. Separate index in the same binder, yes.

Q. You say, it is a separate index?

A. I think so.

Q. I will ask you to look at the depreciation

(Testimony of F. M. Roberts.)

reserve of the corporation, is that in a separate index?

A. No, it seems not to have been transferred into the other or put in here by mistake, perhaps they are all carried that way, there are two separate indices in here; I assumed, one index A to Z of the partnership, one A to Z of the corporation.

Q. Aren't you referring to the accounts receivable and accounts payable, which were not transferred to the partnership?

A. No, the accounts receivable and payable remained with the corporation and your new trial balance, opened up without any cash, without any accounts payable or accounts receivable,—the other items on it were very similar, they were transferred over bodily, that is the items became the same of the new corporation that they had been, new partnership that they had been with the old corporation.

Q. In other words, a new entry was made, carrying forward the corporation balance in exactly the same in the partnership with the exception of your accounts receivable and your accounts payable and your cash on hand?

A. Yes, as I understand the income tax law, for purposes of depreciation that was necessary to so handle it, your depreciation figures on such a sale had to carry through at the same amount.

Mr. Winter: I think that is all. [42]

(Testimony of F. M. Roberts.)

Redirect Examination

By Mr. Shefelman:

Q. Mr. Winter showed you a ledger, I will show you another ledger, I take it for present purposes you don't wish marked, Mr. Winter?

Mr. Winter: No.

Q. Is this a ledger for the Lumber Company?

A. Yes, I gather that from the dates.

Q. And that is a separate ledger for the Lumber Company, itself, is it not?

A. Well, the first A to Z is—I guess the entire ledger is; there are two alphabets in that one.

Q. This is a separate ledger for the Lumber Company, the corporation? A. Yes.

Mr. Winter: What period of time does that ledger cover?

Q. Mr. Winter asked you if you had transferred back to a corporation, whether there would have been any particular liabilities on the part of the partners—did the partnership in that conveyance, convey to you as trustees, for the sum, the \$20,000.00 mortgage? A. It did.

Q. It was asked you with reference to whether or not you had filed a trade name certificate for the partnership involved in this litigation to which we have made reference, did that partnership have occasion to bring suit against anybody?

A. I don't think it ever brought a suit, I am quite certain it never did. [43]

(Testimony of F. M. Roberts.)

The Court: Except this?

A. This is the corporation.

Q. The words "President" and "Treasurer" appear on that check form shown you by Mr. Winter, as a matter of fact prior to the transfer of the tangible assets of the corporation to the partnership, did Mr. Carlson, as President or you, as Treasurer, have occasion to sign any substantial number of checks on the corporation's account?

A. Oh, I don't believe in all the time it ever existed, I ever signed over a dozen and after Mr. Dougherty came there, I don't think Mr. Carlson signed a dozen.

Q. So the words "President" and "Treasurer" appearing on those forms, wouldn't have covered Mr. Dougherty's signature, anyway? A. No.

Q. Do you happen to have personal knowledge of the way those words appeared on those checks?

A.. No, it is all hearsay.

Q. Mr. Carlson would know about that?

A. He told me he did.

Q. The question was asked whether notice was given to customers, do you know whether or not the persons dealing with the Seattle Renton Mill Company learned through the Company's employes that this was a partnership?

A. By customers you mean purchasers from the Seattle Renton Mill Company?

Q. Purchasers?

A. Yes, that was stamped on the invoices after that, [44] I presume we might be able to find one

(Testimony of F. M. Roberts.)

where they forgot to do it, but we had a form of register, I think they went out in quadruplicate and instructions were to stamp them over.

Q. The Seattle Renton Lumber Company, I understand, the corporation is still in existence today, is it not? A. Yes.

Q. As a matter of fact, had to be for the purpose of this suit? A. Yes, they admit—

Q. (Interrupting) And the Seattle Renton Lumber Company didn't close its account out when the Mill Company account was opened? A. No.

Q. I will show you what is marked for identification Plaintiff's exhibit No. 10 and ask what these are?

A. Well, these are the current invoices for part of the month of June and, apparently, all of the month of July.

Q. Of which year? A. 1933.

Mr. Shefelman: I will offer those in evidence, Mr. Winter, before interrogating further.

The Court: Admitted.

(Plaintiff's exhibit No. 10, the invoices just referred to, admitted in evidence.)

PLAINTIFF'S EXHIBIT No. 10

[INVOICE]

Phone
Seattle
RAmier 5990

SEATTLE-RENTON LUMBER CO.

No. 07013
Customer's No. 717

Brynn Mawr, Wash.

Date—6/30/1933

Sold to—John Dower
Address—Renton

Del. to—Your Truck
Tallyman—V. D.

Lin. Ft.	Pieces	Size	Length	Description	Feet	Total Ft.	Price	Amount
4	8x8	18	#1	Com. Rgh. Cedar				
3	6x8	12	#1	Com. Fir s4s.	144	384	20.00	7.68
2	4x6	12	#1	Com. Fir s4s.				
2	6x6	12	#1	Com. Fir s4s.	48			
2	3x12	14	#1	Com. Fir s4s.	72			
4	4x6	16	#1	Com. Fir s4s.	168			
2					64	496	16.00	7.94
						—		
							880	15.62
							JOHN DOWER Lbr.	
							[Illegible]	

(Testimony of F. M. Roberts.)

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 10 (Continued)

[INVOICE]

Phone SEATTLE-RENTON LUMBER CO.
 Seattle Bryn Mawr, Wash.
 Rainier 5990 Customer's No.

Date—6/30/1933

Sold to—Lockwood Lbr. Co.
 Address—Seattle

Del. to—Your Truck
 Tallyman—V. D.

Lin. Ft.	Pieces	Size	Length	Description	Fee	Total Ft.	Price	Amount
500	2x4	14	#1	Com. s4s.	4667	14.00	65.34	Outside

Last ticket of June—1933

KIRK

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 10 (Continued)

[INVOICE]

Phone SEATTLE-RENTON MILL CO. No. 07017
Seattle Bryn Mawr, Wash. Customer's No. 3973
RAinier 5990

Date—7/1/1933

Sold to—Puget Sound Mehy. Depot
Address—Seattle

Lin. Ft.	Pieces	Size	Length	Description	Feet	Total Ft.	Price	Amount
2	4x12	12	#2	Com. Rgh.	96			
9	—	16	#2	Com. Rgh.	576			
16	3x12	12	#2	Com. Rgh.	576			
2	6x6	16	#2	Com. Rgh.	96	1344	12.00	16.13

AL WALLACE

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 10 (Continued)

[DELIVERY RECEIPT]

Phone Seattle RAinier 5990	SEATTLE-RENTON MILL CO. Bryn Mawr, Wash.	No. 07018 Customer's No. -----						
	Date—July 1, 1933							
Sold to—Cottage Lake Lbr. Co. Address—Redmond	Del. to—Your Yard Tallyman—V. D.							
Lin. Ft.	Pieces	Size	Length	Description	Feeet	Total Ft.	Price	Amount
1252	4x6	R/L	#2	Com. Rgh.	2504	13.00	32.55	
5150	8 3x12	9	#2	Com. Rgh.	216	13.00	2.81	
	2x4	8-10-12 16	#1	Com. s4s.	3433	16.00	54.98	
					6153	E. B. J.	90.29	

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 10 (Continued)

[INVOICE]

Phone	SEATTLE-RENTON MILL CO.			No. 07174
Seattle	Bryn Mawr, Wash.			Customer's No.
Rainier 5990				
	Date—7/17/1933			
	Del. to—Your Truck Tallyman—V. D.			
Sold to—Alex Cugini Address—Renton				
Lin. Ft.	Pieces	Size	Length	Description
130	2x6	8	Rgh. Mining	1040
53	2x8	8	Rgh. Mining	565
14	2x10	8	Rgh. Mining	187
65	2x12	8	Rgh. Mining	1040
				2832
				10.00
				28.32
				—

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 10 (Continued)

[INVOICE]

Phone
Seattle
RAinier 5990

SEATTLE-RENTON MILL CO.
Bryn Mawr, Wash.

No. 07175
Customer's No. Geo

Date—7/17/1933

Sold to—Rich Lbr. Co.
Address—Seattle

Del. to—Your Truck
Tallyman—V. D.

Lin. Ft.	Pieces	Size	Length	Description	Feet	Total Ft.	Price	Amount
6314		1x8		R/L #2 Shiplap		4209	8.00	33.67
								LORTIE

(Testimony of F. M. Roberts.)

Plaintiff's Exhibit No. 10 (Continued)

[DELIVERY RECEIPT]

[Endorsed]: Admitted Jan. 23, 1939.

(Testimony of F. M. Roberts.)

Q. As you examine these invoices for July 1933, which is the first month the partnership was in existence, do you see the change made in the mark, "Seattle Renton [45] Lumber Company"?

A. It seems to be marked out with a pencil up to the 17th of July, marked out with a pencil, the word "Mill" written in, then the rubber stamp begins.

Q. May I just show the Court? (Handing to the Court.) A question was asked you with reference to credit agencies, does the corporation which pays cash, that is taking the 10-day discount on its bills for the accounts payable, normally have occasion to resort to credit agencies?

A. The "resort" is usually by the other people, wanting to know whether they are good or not; I have had numerous inquiries from Dun and Bradstreet's about this and other Companies. As a matter of fact, owing to being President of these Banks, I have very frequent calls from them, I have no recollection of ever, perhaps, giving them a full financial statement of either this corporation or this partnership.

Q. When you have been called, have you told the truth about the matter, Mr. Roberts?

A. I have; I couldn't locate the calls.

Mr. Shefelman: That is all.

(Testimony of F. M. Roberts.)

Recross Examination

By Mr. Winter:

Q. The ledger shown to you by Counsel is the ledger covering accounts payable and receivable of the corporation? A. I expect it is.

Q. Doesn't cover anything else? [46]

A. Doesn't cover the general ledger, this is what we would call accounts payable and receivable ledger, the other books you showed me, was general.

Q. Payable and receivable wasn't sold to this alleged partnership? A. They weren't sold.

Mr. Winter: If the Court please, I think I neglected to offer in evidence or ask to be offered in evidence, Defendant's exhibit A-1, a check.

Mr. Shefelman: No objection.

The Court: Admitted.

Defendant's exhibit A-1, the check just referred to, admitted in evidence.

(Testimony of F. M. Roberts.)

Mr. Winter: I think that is all.

Re-redirect Examination

By Mr. Shefelman:

Q. Mr. Roberts, the question was just asked you whether this ledger to which reference was made, contained anything except accounts payable and receivable of the corporation?

A. I didn't examine the pages.

Q. Look at the latter part and tell us whether or not it doesn't have all the records of the corporation in effect, plant and equipment?

A. Of course, I couldn't tell if it had all the records; let me run through it.

Q. Does it have records other than accounts payable and receivable? [47]

A. Yes, it seems—two indices, as I have indicated, and after those, the general ledger in this binder.

Q. General ledger of what?

A. General ledger of the corporate items like—First National Bank of Kirkland control accounts, of accounts receivable, inventory, notes receivable, so called bolt account, which I think we then sold, real estate, auto camp, camp buildings, new buildings, new office, plant equipment, so forth.

Mr. Shefelman: I am going to ask the Clerk to mark this and put it in evidence, if I may.

The Court: Do you ever contemplate asking to withdraw it?

Mr. Shefelman: I certainly do.

The Court: If it is received—

(Testimony of F. M. Roberts.)

Mr. Shefelman: If the difficulties are great, I am going to withdraw it now, before I offer it.

The Court: It would seem, if you took a sample page of the different accounts and photostat them, and supplement it with the testimony of the witness, there would be no difficulty in understanding what was covered.

Mr. Shefelman: May I withdraw the offer of these, and ask leave of the Court to introduce photostat copies of some of these pages? Would you have any objection to that, Mr. Winter?

Mr. Winter: I would like to know what pages? They may not be representative.

Mr. Shefelman: You will have the privilege of photostating any other pages. [48]

Mr. Winter: The same thing is true of the other ledgers, covering the partnership and corporation.

Mr. Shefelman: I will withdraw my offer on the matter entirely. That is all.

Re-recross Examination

By Mr. Winter:

Q. Mr. Roberts, would you just state to the Court—maybe I had better have it marked—what book do you have before you, Mr. Roberts?

A. I was trying to see—the part which you have opened are certificates of annual or semiannual trial balances apparently monthly trial balances, in this part of the book. (Indicating)

Q. Covering what?

A. Covering the corporation.

(Testimony of F. M. Roberts.)

Q. Does it also cover the partnership?

A. I haven't found that out yet—I guess, trial balances from its inception through December 31st, 1932, of the corporation.

Q. And what, if any, of the partnership?

A. Those seem to be all of the trial balances; there is a page at the end and that is a profit and loss statement of the partnership for the last of 1933, for the last of 1934 and for the last of 1935. This, I might say, is a reserve binder, not a current binder.

Q. You say this is not a current binder?

A. I don't think there are any current things in it.

Q. What is this ledger? What do you call it, Mr. Roberts?

A. It is a reserve binder, by which I mean a book to which [49] pages were transferred after the accounts—after they were through with that.

Q. I will ask you to refer to the accounts. Apparently, there is an entry there as late as December—1929, Colby and Dickinson, Incorporated, account up there, account of James C. Carlson on the opposite page, was that closed out?

A. No, it seems to be—

Q. (Interrupting) A current account, isn't it?

A. No, this page is full, it has gone into the reserve binder and this was filled on August 31st, 1937. When they ceased to be current, when you don't have to use them any more in the current

(Testimony of F. M. Roberts.)

book, you put them away in the reserve binder. I presume this has the accounts of both in this reserve binder.

Q. On any accounts of the corporation which were taken over by the socalled partnership, they were carried on the partnership ledger in the same way——?

A. (Interrupting) You said "accounts which were taken over", none were taken over.

Q. The operating accounts were taken over, were they not?

A. No, the corporation bought things from the same people, the partnership bought things from the same people the corporation bought from and sold lumber to the same people the corporation had sold to, but no accounts were taken over.

Q. None of those operating accounts——?

A. (Interrupting) Those are not accounts receivable or payable, they are general ledger accounts that you [50] refer to.

Q. They didn't take over any of the accounts receivable from their active purchasers?

A. No, no, they did business with the same people but they didn't take over the amounts that were owed to them.

Mr. Winter: I think that is all.

(Witness excused)

JAMES C. CARLSON,

called as a witness on behalf of the Plaintiff herein,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Shefelman:

Q. State your name, please?

A. James C. Carlson.

Q. You live at Bryn Mawr, Washington?

A. Yes.

Q. That is the little village just outside of Seattle on the Renton road, where the mill is located, is it not? A. Yes.

Q. You heard Mr. Roberts testify that there was no written articles of partnership between you, is that correct? A. Yes.

Q. When did you first become acquainted with Mr. Roberts and how?

A. Oh, it was 'way back in about 1913, I had a little mill, I got to know him in the Bank at Eatonville, in the Ohop Valley. [51]

Q. And he bought the bank at Eatonville in 1913? A. Yes.

Q. Did you do business with him from that time on?

A. Yes, banked at Eatonville, later on, got associated with him.

Q. When did you actually go into business with him in any way? A. In about 1922.

Q. That was where? A. At Duvall.

Q. And with which concern?

(Testimony of James C. Carlson.)

A. That was then known as the Getchell Lumber and Shingle Company.

Q. Were you a partner in the Bear Creek Timber Company? A. Yes.

Q. Did you have any written articles of partnership there? A. No.

Q. And what was the name of the Getchell Lumber and Shingle Company changed to?

A. Cottage Lake Lumber Company.

Q. What was your connection with this Mill?

A. I was the Manager.

Q. And officer of the Corporation?

A. Yes, when we changed into the Cottage Lake Lumber Company, I became president.

Q. And Mr. Roberts, Secretary and Treasurer of the Company? A. Yes.

Q. Then in 1929 you went with this mill?

A. Yes.

Q. Prior to the change to the partnership, June 30th, [52] 1933, had Mr. Roberts discussed it with you? A. Yes.

Q. And had he told you that the purpose was to decrease as much as possible the income——?

Mr. Winter: (Interrupting) I think the witness should testify.

Mr. Shefelman: I will withdraw the question.

Q. Why, had he told you, the change should be made? A. We could save some taxes.

Q. On June 30th, 1933, were you present at the meetings that he has talked about?

A. Yes.

(Testimony of James C. Carlson.)

Q. Did you, on that day, sign these instruments that have been put in evidence, deed, bill of sale?

A. Yes.

Q. What steps did you take to make known the change in name of the concern after June 30th, 1933?

A. We changed our sign on the mill, changed the signs on the truck and we got a stamp and changed our headings on our bills, letterheads.

Q. Did any customers ask you the reason for the change or what it was about?

A. Yes, practically all of our customers; we only have about a dozen customers, they know us well, our setup.

Q. And did you explain to them the change from a corporation to a partnership? A. Yes.

Q. You heard Mr. Roberts testify with reference to discounting your bills and paying cash, in effect, for all purchases, is that how you have been doing business? [53] A. Yes.

Mr. Shefelman: I understand Defendant's exhibit 1-A has been admitted in evidence?

The Clerk: Yes.

Q. Mr. Carlson, showing you Defendant's 1-A, which is a yellow lithographed printed check "Seattle Renton Mill Company" and down in one corner, in small type, underneath the line where the signature is to be made, appears the words "President" and "Treasurer". Will you tell the Court, if you please, how those checks were ordered and the

(Testimony of James C. Carlson.)
entire story in connection with the appearance of
those words on the check?

A. Well, a salesman came in the Mill, wanted
to sell us some checks.

Q. About when was it?

A. Well, that was, I can't remember exactly,
shortly after we changed the corporation to the
partnership.

Q. Who was that salesman?

A. I can't recall his name.

Q. He is present in the courtroom now?

A. Yes.

Q. Go ahead?

A. He showed us samples of the checks; I
picked out this one; we had them ordered sent out,
and when we got the checks we found this word
"President", "Treasurer" printed on there and
when the gentleman came out, I told him about it.
He was very—he felt quite bad about it; he told me
it was one of the first jobs that he had selling these
checks; he said he was willing to take them back
and have them reprinted, [54] if we insisted; I told
him that wasn't necessary, since we ordered that
many checks, about 10,000, Mr. Dougherty and I
decided to scratch them out and take his checks and
we kept them.

Q. When he showed you the samples and you
ordered the checks, did you have "President" and
"Treasurer" written on that? A. No.

Q. You say he came to you after the checks
were delivered? A. Yes.

(Testimony of James C. Carlson.)

Q. What did you say—with reference to his offering to take them back?

A. Well, I felt sorry for him; I said "I will keep the checks."

Q. How many did you get?

A. I believe it was 10,000.

Q. And are you still on that first 10,000?

A. Yes.

Q. You haven't quite used them up yet?

A. No.

Q. Now, Mr. Carlson, you were the President of the corporation, were you not? A. Yes.

Q. And Mr. Roberts was Treasurer?

A. Yes.

Q. As a matter of fact, during the time that the corporation was doing business, did you have occasion to sign any substantial number of checks as President?

A. No, very little. I would say about a dozen.

Q. Since this partnership was organized in June, the 30th, [55] 1933, who has signed all the checks of the partnership? A. Mr. Dougherty.

Q. He is not a partner, is he? A. No.

Q. And have you and Mr. Roberts signed any substantial number of checks? A. No.

Q. Out of 8,000 or 9,000 checks, you have used about how many, would you say, you have signed?

A. Very few, not over a dozen.

Q. At the time the Mill was transferred to the partnership, the testimony shows, I believe, that 215

(Testimony of James C. Carlson.)

shares of stock stood in your name and 5 in your wife's, 5 in your daughter's and 5, each of your two daughters, total 230, what happened to their interest when the mill was transferred to the partnership?

A. Well, they were my shares in the corporation and they were mine afterwards; I paid for them.

Q. And you considered them yours?

A. Yes.

Q. And you paid for them? A. Yes.

Q. On your income tax returns did you and your wife divide that stock between you, just as you did everything else? A. Yes.

Mr. Shefelman: That is all. [56]

Cross Examination

By Mr. Winter:

Q. Mr. Carlson, you said you could scratch out "President" and "Secretary" on the checks. Did you ever scratch it out?

A. Well, I think we did, when we started in using the checks.

Q. When did you start to use the checks?

A. Well, we started in just as soon as we got them, I can't recollect the date, shortly after.

Q. In November? A. Yes.

Q. Take a look at your checks for November 1933. I want you to show me one where you scratched them out?

A. (Indicating) That isn't my signature.

Q. How many checks did you say you have

(Testimony of James C. Carlson.)

issued in all the time you have been there, probably a dozen? A. Probably.

Q. You mean you would scratch it out and not Mr. Dougherty, is that what you mean by your statement?

A. I wouldn't swear I scratched out mine, either, all of them.

Q. As a matter af fact, you didn't scratch out any, any time, did you, Mr. Carlson?

A. It was our intention.

Q. Have you got one check you could show me you scratched out? A. I think I could.

Q. All right, let's find it.

Mr. Shefelman: If that is material, I [57] suggest the witness finish his testimony, then he can step down and look through the checks.

Q. Look through all the checks, Mr. Dougherty signed some 50 or 60 checks——?

Mr. Shefelman: (Interrupting) I agree none of those are scratched.

Mr. Winter: None of them?

Mr. Shefelman: Not all of them, but the ones you handed the witness don't show the words "President" and "Treasurer" scratched.

Mr. Winter: Would you agree here are some 50 or 60 checks?

Mr. Shefelman: More than that, there are over 100 here, 117. I will agree to that. I will agree, as far as I know, the words "President" and "Treasurer" were not normally seratched off the checks.

(Testimony of James C. Carlson.)

Q. Are you sure you scratched them off, Mr. Carlson, at any time?

A. I signed so few checks, I am sure I scratched out, when I first started, that is my recollection; probably if you find the checks at the first, you will find them scratched out.

Q. How many checks were signed—about a dozen? A. Couple dozen, at the most.

Q. In a period of approximately 10 years?

A. Yes.

Q. There were, normally, issued some 150 checks, would you say, a month, from that Company and from the partnership?

A. Oh, not quite that many, I don't think—possibly.

Mr. Winter: I think that is all. [58]

Redirect Examination

By Mr. Shefelman:

Q. Mr. Carlson, Mr. Dougherty went to work for you when?

A. I think it was about five years ago.

Q. It was about 1932? A. Yes.

Q. Of course, he didn't sign any checks before that time? A. Yes.

Q. And you did sign checks up until the time he came there?

A. Yes, I signed most of the checks.

Q. This same batch of checks shown you by Mr. Winter, all of those are signed by Mr. Dougherty, are they not? A. Yes.

(Testimony of James C. Carlson.)

Q. And he was at no time, President or Treasurer of the corporation while it was in existence?

A. No.

Mr. Shefelman: That is all.

Recross Examination

By Mr. Winter:

Q. I want the witness to find one check where he crossed it out?

Mr. Shefelman: I can't see the particular materiality. I am willing to agree, in general, the words weren't scratched, whether there are one or two out of 9,000 with the words scratched out, I can't make a statement with reference to that. We will try to look through the checks while the other witnesses are testifying; if we can find any, we will tell you. [59]

That is all, Mr. Carlson.

(Witness Excused)

CECIL F. NEIDEFFER,

called as a witness on behalf of the plaintiff herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Shefelman:

Q. What is your full name?

A. Cecil F. Neideffer.

Q. Where do you live, Mr. Neideffer?

(Testimony of Cecil F. Neideffer.)

A. I live in Seattle at the present time.

Q. What is your street address?

A. 617 West Mercer Place.

Q. What is your business?

A. Salesman for the Todd Sales Company, we sell lithographing, such as checks, bank supplies.

Q. And in the fall of 1933, whom were you employed by? A. The Todd Sales Company.

Q. When did you first go to work for them?

A. I first went to work for them in about 1932.

Q. I will show you the Defendant's exhibit No. 1-A, and ask you whether you recognize that?

A. I do.

Q. What is that?

A. That is a check that my Company made and—you understand when I first went to work for the Company, they only allowed me to sell certain products; they just recently released me to sell lithographing and checks. [60]

Q. You said just recently?

A. About the time this order was taken, just before that, I had been given the samples and was turned loose to sell checks, so to speak.

Q. Was that one of the first check orders you ever got?

A. That is right, there is a good deal of detail that has to be compiled in making up a check order.

Q. That has in one corner "Patented Todd, Rochester, N. Y." That is your Company?

(Testimony of Cecil F. Neideffer.)

A. That is right.

Q. Did you, personally, take the order for these checks from Mr. Carlson and Mr. Dougherty?

A. Yes.

Q. You remember about when that was?

A. It was about August or September.

Q. 1933? A. 1933.

Q. Did you show Mr. Carlson and Mr. Dougherty, in general, the layout for the form of the check?

A. Yes, I sketched it up.

Q. Did you also show them your stock in which the check was printed? A. Yes.

Q. Was this the stock you showed them? (Indicating)

A. Yes, they looked at other checks borders, whatnot, to select what they wanted.

Q. Did they select this stock? (Indicating)

A. Yes.

Q. And generally, approve the layout you made?

Mr. Winter: Was that a written order for the [61] checks? A. Yes.

Mr. Winter: The order is the best evidence.

Mr. Shefelman: I haven't asked him what was in the order; I asked whether he personally took the order for the checks, and his answer was yes.

Mr. Winter: That is all right, then.

Q. Did you draw a penciled sketch of the layout of the check? A. Yes.

Q. Do you still have that penciled sketch?

(Testimony of Cecil F. Neideffer.)

A. No.

Q. On that penciled sketch, did the words "President" and "Treasurer" appear or either of those words?

Mr. Winter: I object to that as leading. He can ask what appeared on that sketch.

The Court: Overruled.

Q. On the sketch which you drew at that time and showed them, when you took the order, did you have the words "President" and "Treasurer" on them?

A. I don't remember them being on there, that is quite a long time ago.

Q. Now, how many checks were in that order?

A. 10,000.

Q. Have you renewed that order since?

A. No.

Q. They are still working on the same checks?

A. Yes.

Q. Did you see Mr. Carlson soon after the checks were delivered to him? [62]

A. Yes, I did.

Q. And was anything said by him at that time?

A. Yes.

Q. With reference to the words "President" and "Treasurer"? A. Yes.

Q. What did he say?

A. He brought it to my attention and I said "Well, I was sorry that this was put on, "President" and "Treasurer" was put on the checks,

(Testimony of Cecil F. Neideffer.)

"and explained to him that we would take the checks back and have them made over and he, of course, felt that since just the names "President" and "Treasurer" were on there, and I had showed him other checks, where authorized signatures were put on the signature lines, and made no difference, he says "I don't see it is necessary, just for a few words like that, to make them over", so he was kind enough to keep the checks.

Mr. Shefelman: That is all.

Cross Examination

By Mr. Winter:

Q. Did you know the Seattle Renton Lumber Company was a corporation or not? A. No.

Q. Did you know whether the Seattle Mill Company was a corporation or not? A. No.

Q. Did you have a written order for the purchase of these checks?

A. No—my Company always requests orders signed when we [63] accept the orders for checks.

Q. Have you got the written order?

A. No.

Q. Do you know where it is?

A. Probably in my company's files some place.

Q. Where is your company's offices?

A. Rochester, New York.

Q. You were working for——?

A. (Interrupting) This is a branch office in Seattle.

(Testimony of Cecil F. Neideffer.)

Q. Where is the branch office in Seattle, where in Seattle? A. Terminal Sales Building.

Q. What is the name of the Company?

A. Todd Sales Company.

Q. Is the order, written order, Todd Sales Company order, back in New York?

A. We may have a copy of the work sheet in our office.

Q. You didn't bring that with you?

A. No.

Q. You don't remember what was on that sketch, do you?

A. I remember—sketch outlay you mean?

Q. Do you remember what was on the order?

A. I don't get your question.

Q. Do you remember what the order consisted of, outside of the general amount of the number of checks?

A. Just the amount and price and when to be shipped.

Q. That is all you remember about the order?

A. That is right.

Mr. Winter: I think that is all.

(Witness Excused) [64]

VINCENT DOUGHERTY,

called as a witness on behalf of the Plaintiff herein,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Shefelman:

Q. Your full name is what?

A. Vincent Dougherty.

Q. Where do you live? A. In Renton.

Q. Are you now employed by the Seattle Renton Mill Company? A. Yes.

Q. How long have you been?

A. Since February 15th, 1932.

Q. At that time employed by the corporation?

A. Yes.

Q. Did you remain after they transferred the property to the partnership? A. Yes.

Q. Ever since? A. Yes.

Q. In what capacity? A. Bookkeeper.

Q. Have you held any office in the corporation at any time? A. (No reply.)

Q. Are you a member of the partnership?

A. No.

Q. An employe of the partnership?

A. Yes.

Q. And were of the corporation?

A. Yes. [65]

Q. Were you present at the time Mr. Carlson ordered these checks from Mr. Neideffer?

A. Yes.

Q. And did you see the sketch prepared by Mr. Neideffer at that time showing the layout?

(Testimony of Vincent Dougherty.)

A. Yes.

Q. Were the words "President" and "Treasurer" on that sketch?

A. Not that I know of.

Q. Were you there when he called to see Mr. Carlson after the delivery of the checks?

A. Yes.

Q. What conversation took place between Mr. Carlson and Mr. Neideffer with reference to the words "President" and "Treasurer"?

A. We asked why he put that on the checks and he said "Well—" he thought we wanted it on there, said that if we didn't want the checks written that way, he would take them back and have them made over, and we didn't want to cause him a lot of inconvenience, so we decided to keep the checks, we didn't figure it made any difference.

Q. Since you have been bookkeeper who has signed practically all the checks of the Company?

A. I have.

Q. During the period when the corporation was operating the business, did the President and Treasurer sign any substantial number of checks?

A. Very few.

Q. When did you obtain this printed form of check? [66]

A. It was sometime late in 1933.

Q. When? A. The new printed checks?

Q. Yes.

(Testimony of Vincent Dougherty.)

A. Sometime late in 1933, about October or November, somewhere around there.

Q. I show you what is marked for identification Plaintiff's exhibit No. 11, and ask you what that is?

A. That is a check written from the Seattle Renton Mill Company by myself.

Q. That is dated July 3d, 1933? A. Yes.

Mr. Shefelman: I will offer that in evidence, Mr. Winter.

Mr. Winter: No objection.

The Court: Admitted.

Plaintiff's Exhibit No. 11, the check last above referred to, admitted in evidence.

(Testimony of Vincent Dougherty.)

Q. That is check No. 1 on the Seattle Renton Mill Company account, is it not? A. Yes.

Q. Signed by "V. Dougherty", no designation, President or Treasurer? A. No, sir.

Mr. Shefelman: And I will also offer in evidence Plaintiff's exhibit No. 12, which is a Seattle Renton Mill Company check, dated July 1st, 1933.

Mr. Winter: No objection. [67]

July advance

38

No.

PLAINT, EXHIBIT NO. #12
Claim 1/23/39

1/21 10 33

KIRKLAND, Washington

TO THE
ORDER OF
Otto Skew duckson

FIRST NATIONAL BANK,
KIRKLAND, WASHINGTON.

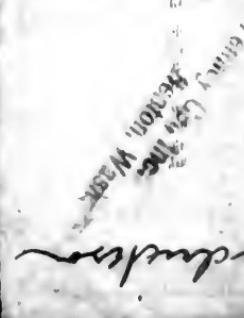
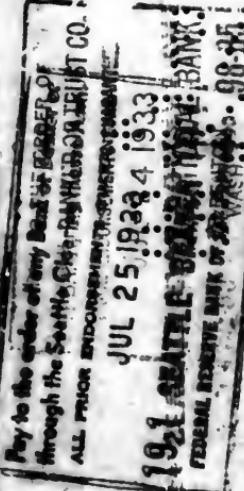
OB. LIO

PAY TO THE ORDER OF
SEVENTY FIVE DOLLARS AND 00 CENTS

DOLLARS

SEATTLE RENTON MILL CO.

BY *J. D. Aughey*



100274
No. 100274
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED

OCT 6 1942

PAUL P. O'BRIEN.
CLERK

116m

(Testimony of Vincent Dougherty.)

Q. That is a check marked July 21st, 1933, (indicating) on the check, showing "Seattle Renton Mill Company" was written in. I notice here, it appears stamped in. Did you in the meantime obtain a regular stamp for your checks?

A. Yes.

Q. That is signed by yourself "V. Dougherty" with no designation of any office?

A. That is right.

Q. Immediately after June 30th, 1933, when the transfer was made, do you recall whether the name "Seattle Renton Lumber Company" was changed to "Mill Company" on the building, trucks and so forth?

A. On the water tank, in front of the mill, we had the painters come.

Q. Was any change made on the invoices and the rest of your stationery?

A. Yes, written in with a pencil, mostly, it was easier to write with a pencil.

Mr. Winter: The records are the best evidence of what change was made on them.

Q. Did any customers, who bought lumber of you, ask you personally about the change, immediately after it was made, June 30th, 1933?

A. Practically all of them at different times, over the 'phone wanted to know what the idea was, to have "Lumber Company" crossed out on the invoice and "Mill Company" written in.

(Testimony of Vincent Dougherty.)

Q. Did you explain it to them?

A. Oh, yes. [68]

Q. Did you tell them what had happened with reference to the transfer of the property?

A. Yes.

Q. You have heard the testimony with reference to the Mill Company and Lumber Company during its operation taking its cash discount within a 10-day period, is that correct? A. Yes.

Q. You keep the books of the partnership?

A. Yes.

Q. You kept the books of the corporation?

A. Yes.

Q. And aside from putting the sheets in the same loose leaf binder, have you kept a separate record for the partnership? A. Yes.

Q. And for the corporation? A. Yes.

Mr. Shefelman: That is all.

Cross-Examination

By Mr. Winter:

Q. You were auditor for the corporation before June 1933, is that right? A. Yes.

Q. Bookkeeper? A. Yes.

Q. You have been keeping the books since?

A. Yes.

Q. Receiving the same salary from the partnership you [69] received from the corporation?

A. Practically the same, maybe improved a little since.

(Testimony of Vincent Dougherty.)

Q. Were you paid any salary by the corporation after June 30th, 1933? A. No.

Q. You have been keeping their books on all accounts receivable, collecting, is that right?

A. Yes.

Q. Paid by the Mill Company? A. Yes.

Q. Did you tell any customers, when they talked to you, asked if any change in the organization, there was no change except in name—what did you tell them?

A. What is the question?

Q. What did you tell the customers when they called you up?

A. I told them we had changed from a corporation to a partnership.

Q. Did you tell them there was any change in the business of any kind?

A. It wouldn't be any of their business, the rest of it.

Q. Did you tell them it was none of their business?

A. No, you couldn't very well do that, with customers.

Q. Did you ever cross out the words "President"—"Vice President" or "President" and "Treasurer" on the checks that you wrote?

A. Lots of them, I don't know just when I started in, though.

Q. Lots of them?

A. Yes, lots of them. [70]

(Testimony of Vincent Dougherty.)

Q. On the new check? A. Yes.

Q. Did you in 1933, in November?

A. I don't remember that.

Q. Will you look at the November checks and see——?

A. (Interrupting) No, I don't think there was any, we have gone through them.

Q. Was it after this, when Mr. Estes, the Revenue Agent, was out at your Company, you started doing that?

A. I would have to check the checks to see.

Q. What is your best recollection, before or after he was out there, that you did?

A. I don't know.

Q. Would you say it was before or would you say after?

A. I know that I have crossed out some after.

Q. Can you tell us of any check you crossed out before then, the date of it? A. No, I did not.

Q. As a matter of fact, you didn't cross any out until that question came up?

A. No, I didn't see any reason to cross it out.

Q. It was after the Revenue Agent was out there?

A. I don't know that, I would have to check the checks to find out.

Q. You wouldn't say you did sign any before?

A. Cross out, you mean?

Q. Yes, before the Revenue Agent was out there?

(Testimony of Vincent Dougherty.)

A. No, I couldn't say that now.

Q. Will you look and see if you can find any?

A. I couldn't say they are here. (Indicating)

[71]

Q. Did you cross them out before 1935?

A. I don't know.

Q. What is your best recollection?

A. I don't know that either, I couldn't tell you that, when I started.

Q. Did you cross any out prior to May 1st, 1935? A. I don't know.

Q. You have been the Auditor of the Company. You have all the checks here?

A. No, I haven't got one quarter of them, not a tenth of them.

Q. I mean during the period of June 30th to May 1st, 1935, do you have all those checks here?

A. From when?

Q. June 30th, 1933, to May 1st, 1935?

A. No, I don't think so, no we haven't, maybe, too, I would have the checks.

Q. Can you produce in Court any check where you have crossed out—they are in your custody, aren't they, as bookkeeper or Auditor of the Company?

A. Yes—no occasion to cross it out, not necessary.

Q. Then you did not?

(Testimony of Vincent Dougherty.)

A. I did not make any particular effort to cross them out.

Mr. Winter: That is all.

Mr. Shefelman: I will offer in evidence, before you leave the stand, the batch of 117, I take it, less 2 checks put in evidence already, representing the checks drawn on the account of the Seattle Renton Mill Company during the month of July 1933.

Mr. Winter: No objection, Your Honor. [72]

The Court: Admitted, No. 13.

Plaintiff's exhibit No. 13, the checks just referred to, 117 checks, admitted in evidence, less 2 checks already admitted in evidence.

KIRKLAND July advance

KIRKLAND

No. 3

10

33

PAY TO THE
ORDER OF

RUCKLAND WASHINGTON

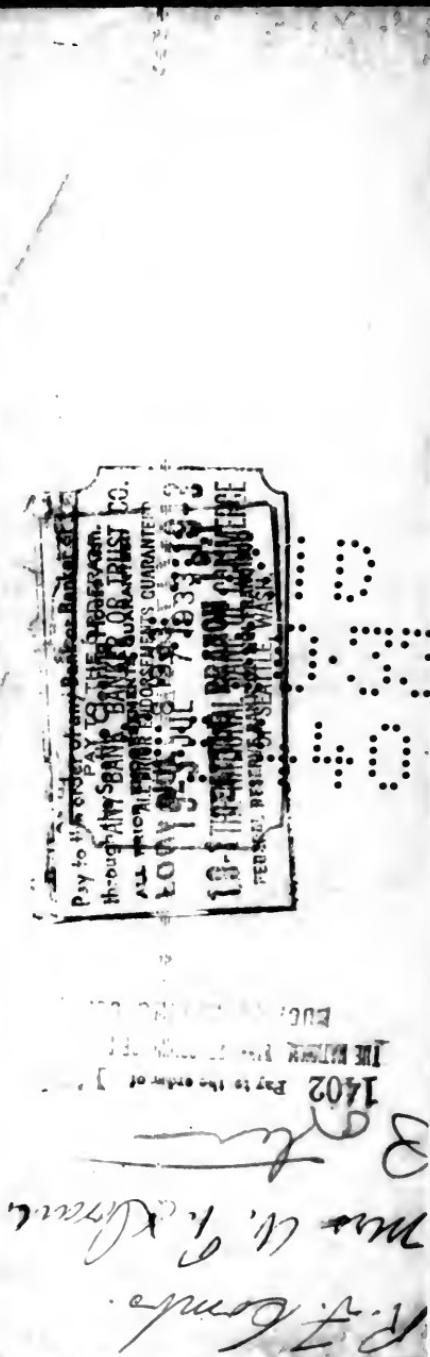
A. J. Comba

75

54.00

FOUR DOLLARS AND FORTY FOUR CENTS
DRAFT ON FIRST NATIONAL BANK
W. A. Gougherty

To FIRST NATIONAL BANK
W. A. Gougherty
OB. 140 KIRKLAND, WASHINGTON



KIRKLAND
Fully advance

22.00

No. 2

78
10 33

J. C. Carlson
order of

Kirkland, Washington

PAY TO THE
ORDER OF

\$200.00

TWO HUNDRED POUNDS ONLY DOLLARS

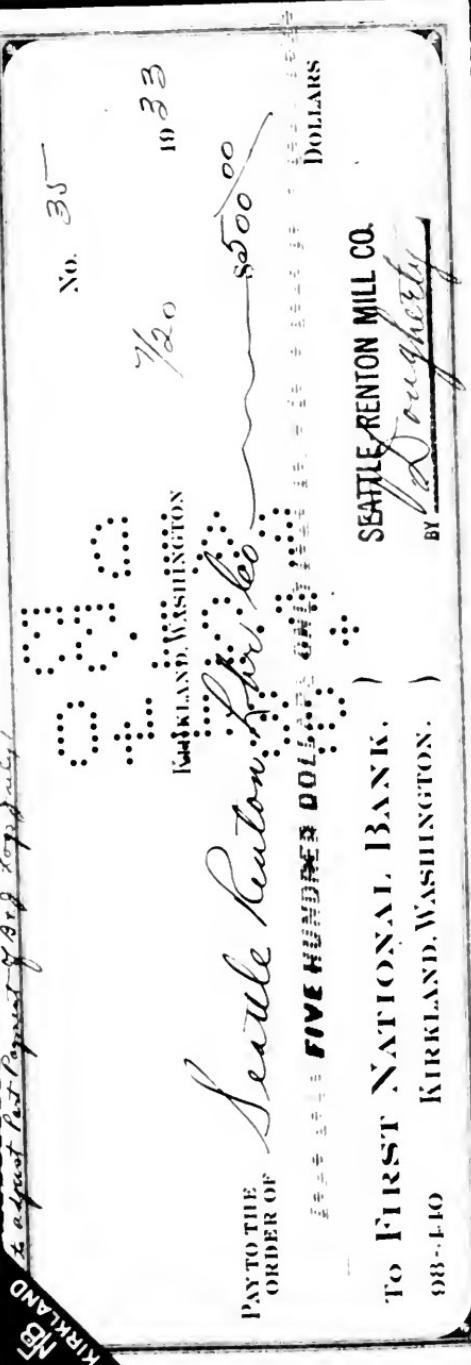
To FIRST NATIONAL BANK,
93-110 KIRKLAND, WASHINGTON.

Seale Weston will be
by J. Goughier.

PAID
7-12-33
28.440

July 12 1933

KIRKLAND
To adjust part payment of \$1000 due us
10/23/00



10/23/00
FIRST NATIONAL BANK OF KIRKLAND
SEATTLE RENTON LUMBER CO.
For the order of

PAID
7.213
36.440

(Testimony of Vincent Dougherty.)

PLAINTIFF'S EXHIBIT No. 13

Deposited for credit of Seattle Renton Mill Co.
with First National Bank of Kirkland, Wash.
Member Federal Reserve Bank.

7/3/33

In making this deposit the depositor hereby assents to the conditions stated on the reverse side of this form.

Specify Banks Upon Which Checks Are Drawn

	Dollars	Cents
Gold		
Silver		
Currency		
Checks		
J. W. Neilson.....	5,000	00
Total		

(Testimony of Vincent Dougherty.)

Deposited for credit of Seattle Renton Mill Co.
with First National Bank of Kirkland, Wash.
Member Federal Reserve Bank.

7/7/33

In making this deposit the depositor hereby assents to the conditions stated on the reverse side of this form.

Specify Banks Upon Which Checks Are Drawn

	Dollars	Cents
Gold		
Silver		
Currency		
Checks		
Mrs. Henry L. Grey....	8	50
Paul Newell	23	35
<hr/>		
Total.....	31	85

(Testimony of Vincent Dougherty.)

Deposited for credit of Seattle Renton Mill Co.
with First National Bank of Kirkland, Wash.
Member Federal Reserve Bank.

Jul. 8, 1933

In making this deposit the depositor hereby assents to the conditions stated on the reverse side of this form.

Specify Banks Upon Which Checks Are Drawn

	Dollars	Cents
Gold		
Silver		
Currency		
Checks	31	85
<hr/>		
Total.....	31	85

(Stamped) : Duplicate. (Illegible initial.)

[Endorsed] : Admitted Jan. 23, 1939.

Mr. Shefelman: That is all.

(Witness Excused.)

JAMES P. WETER,

called as a witness on behalf of the Plaintiff herein,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Shefelman:

Q. State your name, please.

A. James P. Weter.

Q. You are a member of our firm, Weter, Roberts and Shefelman? A. Yes.

Q. You and Mr. Roberts have been associated together in the practice of law, partners, since when?

A. I think the first of January 1904.

Q. From that date to this, have you and Mr. Roberts been associated as partners in various enterprises? A. In a great many.

Q. During the last ten or fifteen years, there have been joint with you in some of these enterprises, some of the other persons, partners, in this transaction, such as Mr. Shinstrom and Mr. Swan?

A. Yes. [73]

Q. And have you ever had any written articles of partnership between you on any of your partnership ventures? A. We never have.

Q. Did you discuss with Mr. Roberts, prior to June 30th, 1933, the advisability of transferring the mill to a partnership? A. I did.

Q. And did you, as a stockholder, agree to it?

A. I did.

(Testimony of James P. Weter.)

Q. Did you discuss it with your wife?

A. No.

Q. What was your expressed purpose in making the transfer?

A. To avoid corporation income taxes.

Mr. Shefelman: That is all.

Mr. Winter: That is all.

(Witness Excused)

Mr. Shefelman: That is the plaintiff's and petitioner's case, if the Court please.

Mr. Winter: If the Court please, if Counsel has no objection to it being a photostat copy, I would like to offer in evidence the assessment letter, which shows the basis of the assessment against the plaintiff in this case. I think it will be helpful to the Court in showing the basis upon which the assessment—it shows the amount—this is the amount—net income report of the partnership return, I am not sure that is shown in there, and some adjustments made not here in issue— [74]

Mr. Shefelman (Interrupting): Everything with reference to these matters as pleaded in our petition, is admitted by the defendant and I have tried to make my record just as short as possible. The only purpose I can see in that is to perhaps acquaint the Court with some of the persuasive reasons of the Department for making the assessment.

Mr. Winter: So as to show the basis on which

the assessment is made; you have the original assessment letter?

Mr. Shefelman: Yes.

Mr. Winter: I offer it in evidence. You make no objection to the photostat copy.

Mr. Shefelman: There will be no objection to that but I don't see its materiality to the case.

Mr. Winter: The basis on which the assessment was rendered.

The Court: Admitted.

Defendant's Exhibit A-2, the letter just referred to, admitted in evidence.

DEFENDANT'S EXHIBIT No. 2-A

SN-AE

Registered Jan 10 1936

IT:AR:E-3

VDS-90D

Seattle Renton Lumber Co.,

Bryn Mawr, Washington.

Sirs:

You are advised that the determination of your income tax liability for the taxable year(s) 1933 discloses a deficiency of \$2772.90 and that the determination of your excess profits tax liability for the year(s) mentioned discloses a deficiency of \$874.39 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiencies mentioned. Within ninety days (not

Defendant's Exhibit No. 2-A—(Continued)
counting Sunday or a legal holiday in the District
of Columbia as the nineteenth day) from the date
of the mailing of this letter, you may file a petition
with the United States Board of Tax Appeals for
a redetermination of the deficiencies above stated.

Should you not desire to file a petition, you are
requested to execute the enclosed form and for-
ward it to the Commissioner of Internal Revenue,
Washington, D. C., for the attention of IT:C:P-7.
The signing and filing of this form will expedite
the closing of your return(s) by permitting an early
assessment of the deficiencies, and will prevent the
accumulation of interest, since the interest period
terminates thirty days after filing the form, or on
the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By

(Signed)

W. T. SHERWOOD

Acting Deputy Commissioner

Enclosures:

Statement

Form 870

VBS/CSH-3

Defendant's Exhibit No. 2-A—(Continued)
STATEMENT

IT:AR:E-3

VBS-90D

In re: Seattle Renton Lumber Co.,
Bryn Mawr, Washington.

Tax Liability for Taxable Year 1933

	Tax Liability	Tax Assessed	Deficiency
Income tax	\$3,263.93	\$491.03	\$2,772.90
Excess-profits tax	874.39	None	874.39

Careful consideration has been accorded your protest dated June 13, 1935 in connection with findings of the examining officer, and the information submitted at a conference held in the office of the internal revenue agent in charge.

The records of this office indicate that no reply has been received to letter dated October 26, 1935, advising you of the approval of the report submitted by the internal revenue agent in charge at Seattle, Washington, a copy of which was transmitted to you.

Computation of Net Income

Net income reported on return.....	\$3,571.15
Add:	
(a) Excessive depreciation for period January 1, 1935 to June 30, 1933	\$ 279.86
(b) Unreported income for last 6 months of that year.....	19,754.55
(c) Life insurance premiums.....	508.79
Total	20,543.20
	\$24,114.35

Defendant's Exhibit No. 2-A—(Continued)

Less:

(d) Taxes understated January 1, 1933 to June 30, 1933.....	\$ 326.65
(e) Capital stock tax.....	50.00

Corrected net income.....	\$23,737.70

Explanation of Items

(a) Depreciation as shown in Exhibit A enclosed is believed to be a reasonable allowance for exhaustion, wear and tear of your depreciable assets for the period January 1, 1933 to June 30, 1933 and depreciation claimed in excess of that amount, accordingly, has been disallowed.

(b) This office holds that there was no partnership formed as at July 1, 1933 for the following reasons:

(1) There was no written partnership agreement as to control and management by the individual partners or as to how earnings should be distributed.

(2) The majority of the so called partners were inactive and it appears that none of the stockholders had ever formally agreed to the transfer of the assets of the corporation to the so called partnership.

(3) It would appear to be possible that the alleged partnership was formed even without the knowledge of some of the stockholders of the corporation.

(4) The continued existence of the corporation would indicate that the so-called partnership is in

Defendant's Exhibit No. 2-A—(Continued)
name only and the business is actually conducted as
a corporation.

The entire net income for the year, accordingly,
has been included in the corporation's net income.
The unreported income for the last six months of
the year was computed as shown below:

Net income reported on partnership return by Seattle Renton Mill Co.....	\$19,050.62
Add:	
(1) Excessive depreciation claimed (See Exhibit B Enclosed).....	\$275.79
(2) Taxes overstated	428.14
	703.93
Net income for period July 1, 1933 to December 31, 1933.....	\$19,754.55

Taxes disallowed covering the last one-half of 1932 real and personal property taxes were accrued prior to July 1, 1933, and, therefore, were not a proper deduction for a period subsequent to July 1, 1933.

(c) Life insurance premiums paid on the life of an officer of the corporation have been disallowed as deductions in accordance with article 283 of Regulation 77 since the corporation is the beneficiary of the policy.

(d) The excess amount of taxes accrued over taxes paid has been allowed as a deduction since your books and accounts are kept on the accrual basis.

Defendant's Exhibit No. 2-A—(Continued)

Accrued real and personal property taxes.....	\$757.37
Taxes deducted	430.72
Additional deduction	\$326.65

(e) Capital stock tax is an allowable deduction in accordance with section 23(c) of the Revenue Act of 1932.

Computation of Tax

Net income	\$23,737.70
Income tax at 13 $\frac{3}{4}$ %.....	\$3,263.93
Tax originally assessed #4 400021.....	491.03
Deficiency in income tax.....	\$2,772.90
Net income	\$23,737.70
Less:	
12 $\frac{1}{2}$ % of declared value of capital stock, \$50,000.00	6,250.00
Balancet subject to excess-profits tax.....	\$17,487.70
Excess-profits tax at 5%.....	\$ 874.39
Previously assessed	None
Deficiency in excess-profits tax.....	\$ 874.39

In case you agree to the entire amounts of the deficiencies, please fill in the amounts of \$2,772.90 and \$874.39 on the enclosed form 870 (Waiver of Restrictions) and forward it, properly executed, to the Commissioner of Internal Revenue, Washington, D. C. However, if you do not acquiesce in all of the adjustments making up the deficiencies indicated, but would like to stop the accumulation of interest on that part of the deficiencies resulting

Defendant's Exhibit No. 2-A—(Continued)
from adjustments to which you agree, please fill
out the form 870 inserting therein the amounts you
desire to have assessed at once. In the event that
you agree to only a part of the deficiencies indicated,
the execution of the form for the agreed portion
of the deficiencies will not deprive you of your
right to petition the United States Board of Tax
Appeals for a redetermination of the tax liability
for the year or years to which it relates.

Defendant's Exhibit No. 2-A (Continued)

IT:AR:E-3

VBS-90D

Seattle Renton Lumber Company

EXHIBIT A
DEPRECIATION SCHEDULE

Description	Acquired	Corrected Balance Close of Year	Additions	Reserve December 1, 1932	Rate of Cost or Estimated Life From Dec. 31, 1932	Unrecovered Balance Dec. 31, 1932	Depreciation 6 Months to June 30, 1933	Amended Reserve June 30, 1933
Plant and Equipment.....	1929		\$101,392.46)	\$13,342.65	5% on cost	\$88,049.81)		
	Jan. 3, 1933	\$101,763.64	½ 371.18)		5% on cost	)	\$2,544.09	\$15,886.74
Mack Truck	1930	5,500.00	5,500.00	1,833.33	5 Years	3,666.67	366.67	2,200.00
Second Hand Truck.....	Sept. 1, 1932	345.00	345.00	38.33	2½ Years	306.67	55.76	94.09
Ford Coupe	1931	669.00	669.00	248.37	3 Years	420.63	70.10	318.47
Boat	1929	1,773.12	1,773.12	457.79	12 Years	1,315.33	54.80	512.59
Office Equipment	1929	580.48	580.48	57.45	5% on cost	523.03	14.51	71.96
				<hr/>			<hr/>	
				\$15,977.92			\$3,105.93	\$19,083.85

DEPRECIATION SUMMARY

Depreciation claimed	\$3,385.79
Depreciation allowed	3,105.93
Depreciation decreased	\$ 279.86

VBS/CSH-3

A (Continued)

SCHEDULE

Reserve June 30, 1933	Estimated Life From June 30, 1933	Unrecovered Cost at June 30, 1933	6 Months Amended Depreciation 1933	Amended Reserve Dec. 31, 1933
\$886.74	5% on cost	\$85,876.90	\$2,544.09	\$18,430.83
2,200.00	4½ Years	3,300.00	366.67	2,566.67
94.09	2¼ Years	250.91	55.75	149.84
318.47	2½ Years	350.53	70.10	388.57
,512.59	11½ Years	1,260.53	54.80	567.39
71.96	5% on cost	508.52	14.51	86.47
	5% on cost		4.08	4.08
<hr/> \$,083.85		<hr/> \$91,547.39	<hr/> \$3,110.00	<hr/> \$22,193.85
		\$3,385.79		
		3,110.00		
		<hr/>		
		\$ 275.79		

Mr. Winter: The defendant rests, Your Honor. Your Honor, this case has to be briefed. Mr. Shefelman, you filed a brief?

Mr. Shefelman: That was only a trial brief, was no attempt to brief our case at all.

The Court: Neither side will be deprived of the opportunity to brief the case.

(Argument.)

(Adjournment.)

[Endorsed]: Filed Sep. 8, 1942. [75]

[Endorsed]: No. 10274. United States Circuit Court of Appeals for the Ninth Circuit. Seattle Renton Lumber Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed October 5, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
Ninth Circuit

No. 10274

SEATTLE RENTON LUMBER CO., a
corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

To the Honorable Judges of the United States Circuit Court of Appeals—Ninth Circuit and to the United States of America, Appellee herein:

The Seattle Renton Lumber Co., a corporation, Appellant herein, on its appeal to the United States Circuit Court of Appeals—Ninth Circuit, will rely on the following points:

1. That the United States District Court for the Western District of Washington, Northern Division, erred in making the findings contained in Paragraphs VI, VII, VIII, IX and X of that Court's Findings of Fact (Pages 32 to 35 of District Court's Transcript of Record), wherein the Court found that there was no partnership formed by the stockholders of the Appellant taxpayer prior to, or on June 30, 1933, or at any time before January 1, 1934; that the Appellant operated its busi-

ness on the same basis after June 30, 1933 as it did prior thereto; that income arising out of the operation of the business subsequent to June 30, 1933, was income of the Appellant; that Appellant failed to satisfy the requirements of the burden of proof, and that the record showed no overpayment of tax. The said findings were erroneous in that there was insufficiency of the evidence to justify such findings since no evidence was adduced that the Appellant engaged in business or received incom so as to subject it to a tax after June 30, 1933, but to the contrary, all of the evidence introduced clearly established that a partnership was formed prior to or on June 30, 1933, which thereafter owned and operated the business, and that Appellant did not engage in any business nor receive any income so as to subject it to a tax after June 30, 1933, and the Court should have made findings of fact to the effect that such a partnership was formed on or before June 30, 1933, and that Appellant did not engage in any business nor receive any income so as to subject it to a tax after June 30, 1933.

2. The said District Court further erred in making its Conclusions of Law (Page 35 of the District Court's Transcript of the Record) and Judgment (Page 36 of the District Court's Transcript of the Record) because of the insufficiency of the evidence as hereinbefore stated to justify the findings of the said court, and the court should have made its Findings of Fact, Conclusions of Law and Judgment to the effect that a partnership was formed prior to

or on June 30, 1933, which thereafter owned and operated the business; that Appellant did not engage in any business nor receive any income so as to subject it to tax after June 30, 1933; and that Appellant should recover judgment against the Appellee for the sum of the taxes paid herein by Appellant pursuant to the notice of deficiency given by the Collector of Internal Revenue.

**SEATTLE RENTON LUMBER
CO., a corporation,
Appellant.
By WETER, ROBERTS &
SHEFELMAN
Its Attorneys**

Copy received this 7th day of October, 1942.

**J. CHARLES DENNIS
THOMAS R. WINTER**

[Endorsed]: Filed Oct. 12, 1942.

[Title of Circuit Court of Appeals and Cause.]

**STIPULATION OF MATTER TO BE
INCLUDED IN PRINTED RECORD**

To the Honorable Clerk of the Above Entitled Court:

The Seattle Renton Lumber Co., a corporation, appellant, and the United States of America, appellee, by their respective attorneys, Weter, Roberts & Shefelman, and J. Charles Dennis and Thomas

R. Winter, stipulate and designate that the following portions of the proceedings and evidence certified to this court by the Clerk of the United States District Court for the Western District of Washington, Northern Division, be included in the printed record herein:

I.

All of the Transcript of the Record certified to this court by Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, Northern Division, by his Chief Deputy, Truman Egger, which Transcript includes the following:

Page of Transcript	Item
1	Names and addresses of counsel
2 to 7 (inc.)	Plaintiff's Petition
8 to 10 (inc.)	Defendant's Answer
11 to 12 (inc.)	Plaintiff's Reply
13	Stipulation submitting case to Honorable Judge Lloyd L. Black
14 to 29 (inc.)	Oral Decision of the Honorable Judge Lloyd L. Black
30	Motion for New Trial
31	Order Denying Motion for New Trial
32 to 35 (inc.)	Findings of Fact and Conclusions of Law
36	Judgment
37	Notice of Appeal

Page of Transcript	Item
38	Order Transmitting Exhibits
39	Stipulation of Record on Appeal
41 to 42 (inc.)	Certificate of Clerk of District Court of record on appeal

All of the Reporter's Transcript of the evidence, which is entitled "Statement of Facts", which transcript is certified to by the Clerk of the District Court in the certificate found on pages 41 and 42 of the Transcript of the Record.

II.

The following exhibits or parts thereof, the originals of which have been filed in this court and have been duly certified to by the Clerk of the District Court for the Western District of Washington, Northern Division:

Plaintiff's Exhibits:

Number of Exhibit	Portion thereof to be included
1	All
2	All
3	All
4	All
5	All
6	All
7	All
8	All
9	All
10	All

The following invoices only in this Exhibit should be included:

Number of Invoice	Date thereof
07013	June 30, 1933
07016	June 30, 1933
07017	July 1, 1933
07018	July 1, 1933
07174	July 17, 1933
07175	July 17, 1933
07304	July 31, 1933

Number of Exhibit	Portion thereof to be included
11	All
12	All
13	

The following checks and deposit slips only in this exhibit should be included:

Deposit Slips issued by First National Bank of Kirkland, dated:

July 3, 1933
July 7, 1933
July 8, 1933

Checks:

Number	Date
2	July 3, 1933
3	July 5, 1933
4	July 8, 1933
35	July 20, 1933
69	July 26, 1933

Defendant's Exhibits:

Number of Exhibit	Portion thereof to be included
1-A	All
2-A	All

Dated this 7th day of October, 1942.

WETER, ROBERTS &
SHEFELMAN,

Attorneys for Appellant

J. CHAS. DENNIS,

THOMAS R. WINTER,

Attorneys for Appellee.

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE RENTON LUMBER COMPANY, a
corporation, *Appellant,*
vs.
UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

FILED
DEC - 1941
PAUL P. O'BRIEN,
CLERK

WETER, ROBERTS & SHEFELMAN,
Attorneys for Appellant.

1612 Northern Life Tower,
Seattle, Washington.



IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE RENTON LUMBER COMPANY, a
corporation, *Appellant,*
vs.
UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
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BRIEF OF APPELLANT

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[*Italics*, wherever used in this brief, are ours]

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE RENTON LUMBER COMPANY, a
corporation, *Appellant,* }
 vs. }
UNITED STATES OF AMERICA, *Appellee.* }

No. 10274

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTIONAL FACTS

This action was instituted in the District Court of the United States for the Western District of Washington, Northern Division, by the Seattle Renton Lumber Company, a Washington corporation, in March, 1938, to recover from the United States of America certain income and excess profits taxes in the sum of \$4023.37 paid for the taxable year 1933 (R. 2-10). Notice of deficiency was given appellant on January 10, 1936, and on May 11, 1936, the tax assessed was paid under protest (R.3). On November 6, 1936, appellant filed claims for refund with the

Collector of Internal Revenue (R. 4) which were disallowed by the Commissioner on April 9, 1937 (R. 9).

Alex McK. Vierhus, the Collector of Internal Revenue to whom payment of the taxes was made, ceased to serve in that capacity prior to the commencement of this action (R. 10).

All of the foregoing facts were set forth in appellant's petition (R. 2-10) and were admitted in appellee's answer (R. 11-13).

This action was instituted against the United States of America in the District Court under authority of the Judicial Code of the United States, 28 U.S.C.A. Sec. 41, sub-sec. 20.

The case came on for trial before the Honorable E. E. Cushman, Judge of the United States District Court, sitting without a jury, on January 23, 1939. He took the matter under advisement, but before rendering any decision retired because of ill health (R. 19). On stipulation of counsel (R. 16) the matter was submitted to the Honorable Lloyd L. Black, Judge of the United States District Court, for decision upon the transcript of the evidence without further testimony. After argument, Judge Black rendered his oral decision on March 15, 1941, wherein he ruled that appellant's petition should be dismissed (R. 27). Findings of Fact, Conclusions of Law and final Judgment dismissing appellant's petition were thereafter made and entered by Judge Black on August 20, 1941 (R. 37-43). On August 27, 1941, appellant served and filed its motion for new trial (R. 34) which was entertained and considered by the court and by order denied on the 13th day of July, 1942 (R. 35). On Sep-

tember 5, 1942, appellant filed its notice of appeal and a proper bond (R. 43). On September 8, 1942, a stipulation of the matters to be included in the record on appeal addressed to the Clerk of the District Court was filed (R. 45). The said record was filed in this court on October 5, 1942, and the case docketed on October 12, 1942 (R. 177).

Jurisdiction for this appeal in the Circuit Court of Appeals is claimed under authority of the Judicial Code, 28 U.S.C.A., Secs. 225 (Supp.) and 226.

STATEMENT OF THE CASE

The appellant, Seattle Renton Lumber Company, a Washington corporation, instituted this action in the United States District Court against the United States of America to recover the sum of \$4023.37 representing income and excess profits taxes and interest thereon paid by it pursuant to a notice of deficiency issued by the Collector of Internal Revenue. Appellant asserted that the taxes were erroneously assessed. It alleged in its petition that it was a Washington corporation doing business in Seattle and that it made an income tax return for the year 1933 showing income of \$3571.15 on which it paid income tax of \$491.03 but no excess profits tax (R. 2); that on July 1, 1933, it sold its plant and inventories to a partnership which thereafter operated the business formerly owned by the appellant, the members of the partnership reporting the income from the business after July 1, 1933, in their individual tax returns (R. 3); that thereafter the Income Tax Department ruled that the

income earned by the business subsequent to July 1, 1933, was income of the corporation and that the corporate income should be increased by \$19,618.10, which action by the Department was protested by the corporation to the Commissioner of Internal Revenue, but the protest was overruled (R. 3) and notice of deficiency was given to appellant; that pursuant thereto appellant made the additional payments of income and excess profits taxes, for the recovery of which this action was instituted; and that subsequent to the payment of the taxes, appellant regularly filed its claims for refund which were rejected by the Commissioner of Internal Revenue (R. 4-10).

In answer to appellant's petition the United States of America answered admitting essentially all of the allegations of appellant's petition except it denied that the income from the operation of the business subsequent to July 1, 1933, belonged to a partnership, but alleged that the income in fact belonged to the corporation (R. 11, 12).

The sole issue raised by the pleadings and for the determination of which this appeal is prosecuted is whether or not appellant received the income from the operation of the lumber mill subsequent to July 1, 1933. It is appellant's position that on that date the corporation transferred all of its operating property and inventories to its shareholders who thereafter operated the business as a partnership under the name, Seattle Renton Mill Co. Appellee contends the transfer was not accomplished. Appellee called no witnesses at the trial. Various witnesses

testified on behalf of appellant and their testimony is uncontradicted.

The evidence is essentially as follows:

The Seattle Renton Lumber Company was incorporated under the laws of the State of Washington in 1929 after which it built a sawmill and was continuously engaged in the manufacture and sale of lumber until the last day of June, 1933. The stockholders of the corporation were, with the exception of James C. Carlson and certain members of his family and James P. Weter, relatives of F. M. Roberts by blood or marriage (R. 51). James P. Weter was a law partner of F. M. Roberts, having been associated with him since 1904 (R. 51). James C. Carlson had been a business associate of F. M. Roberts for many years (R. 61). In the spring of 1933 F. M. Roberts, who was the Secretary and Treasurer and one of the members of the Board of Trustees of appellant (R. 50), discussed with all of the shareholders except the wife and two children of James C. Carlson (the stock in their names being in fact owned by James C. Carlson (R. 136)), the matter of transferring the mill business to a partnership on June 30th next (R. 53), at which time the corporation ordinarily took inventory and made its semi-annual profit and loss statement (R. 57). The purpose was admittedly to reduce income taxes (R. 53). The matter was approved by all said stockholders (R. 53).

F. M. Roberts, James C. Carlson and Mr. Dougherty, who was the mill bookkeeper, took steps to get the books in shape so that the transfer could be accomplished on the last day of June, 1933 (R. 57). On

June 15, 1933, due and regular notice of a special meeting of the shareholders of the corporation to pass upon the sale of the assets of the corporation to the partnership was given (R. 59). Pursuant to the notice a stockholders meeting was held on June 30, 1933, at which the action of the Board of Trustees, taken earlier that day, selling all of the corporate assets except the accounts receivable to a partnership composed of the shareholders was approved (R. 67). On the same day appellant Seattle Renton Lumber Company by its officers executed and delivered a deed to all its real property to F. M. Roberts (R. 69), who concurrently executed a declaration of trust reciting that he held the property in trust for the partners, doing business as Seattle Renton Mill Co., naming them and designating their respective interests (R. 76-78). At the same time appellant also executed a bill of sale of all its personal property to the Seattle Renton Mill Co., a partnership (R. 73).

After June 30, 1933, separate records were kept for the said partnership (R. 112) which operated thereafter under the name of the Seattle Renton Mill Co. New bank accounts were opened for the partnership (R. 95) and the business was in fact operated as a partnership. The signs on the mill water tower, motor trucks and automobile were changed to show the new name (R. 98). The old stationery, bill forms, checks, etc., were changed by pencil or by rubber stamp until the existing supply ran out when new supplies were procured and printed with the name of the partnership thereon (R. 102, 148, 150, 157, 158-161, 117-123). In the following March the income

from the operation of the business from June 30 to December 31 was reported by the partners in their individual income tax returns in proportion to their interest in the partnership.

There is no evidence that any business was transacted by appellant corporation subsequent to June 30, 1933, except that the United States introduced in evidence a check (R. 126) whereon the words "President" and "Treasurer" were printed below the signature line under the name "Seattle-Renton Mill Co." However, from July 1, 1933, to November of that year blank checks only were used on which the name "Seattle Renton Mill Co." was placed (R. 148, 150, 157-161). In November a new supply was ordered and, by mistake on the part of the check salesman, the words "President" and "Treasurer" appeared on the checks (R. 134, 139-144-146). The check order was large and the mill manager decided to keep the checks rather than require that they be made over (R. 134). It is also interesting to note that practically all of the checks were signed by Mr. Dougherty who was the bookkeeper for the partnership, and originally for the corporation. He was never an officer in appellant corporation (R. 139, 152).

There were no written Articles of Copartnership. The parties interested in appellant and in the partnership were closely related either by blood, marriage or business ties and many of them had been associated together as partners over a long period of years. In no case had they ever had written Articles of Copartnership (R. 55-57). The deed by which the real property was transferred, the declaration of trust and

the bill of sale transferring the personal property to the partnership were not recorded, nor was a certificate of assumed name filed. These facts are wholly negative in character and, as will be pointed out, have no legal effect on the validity of the transactions. Yet they were the principal basis for the conclusion of the Bureau of Internal Revenue that no partnership existed.

SPECIFICATIONS OF ERROR

1. The United States District Court for the Western District of Washington, Northern Division, erred in making the findings contained in Paragraphs VI, VII, VIII, IX, and X of that Court's Findings of Fact (R. 37-40), wherein the court found that no partnership was formed by the stockholders of the appellant on June 30, 1933, or at any time before January 1, 1934; that the appellant operated its business on the same basis after June 30, 1933, as it did prior thereto; that income arising out of the operation of the business subsequent to June 30, 1933, was income of the appellant; that appellant failed to satisfy the requirements of the burden of proof, and that the record showed no overpayment of tax. These findings were erroneous in that there was insufficiency of the evidence to justify such findings since no evidence was adduced that the appellant engaged in business or received income so as to subject it to a tax after June 30, 1933, but to the contrary, all of the evidence introduced clearly established that a partnership was formed on June 30, 1933, which thereafter owned and operated the business, and that appellant did not engage in any business nor receive any income so as to

subject it to a tax after June 30, 1933, and the court should have made findings of fact to the effect that such a partnership was formed on June 30, 1933, and that appellant did not engage in any business nor receive any income so as to subject it to a tax thereafter.

2. The District Court further erred in entering its Conclusions of Law (R. 40) and Judgment (R. 42) because of the insufficiency of the evidence, as hereinbefore stated, to justify the findings of the court, and the court should have entered its Findings of Fact, Conclusions of Law and Judgment to the effect that a partnership was formed on June 30, 1933, which thereafter owned and operated the business; that appellant did not engage in any business nor receive any income so as to subject it to tax after June 30, 1933; and that appellant should recover judgment against the appellee for the sum of the taxes paid herein by appellant pursuant to the notice of deficiency given by the Collector of Internal Revenue.

SUMMARY

The appellant did not earn any income after June 30, 1933, for on that day it effectively divested itself of ownership, control and management of the mill business it had formerly operated. This fact, which was clearly established, in itself warrants reversal of the trial court which in effect found that the appellant earned income after that date. In addition to this, the evidence conclusively showed that a partnership came into existence and operated the business after June 30, 1933. This evidence shows the intent to create a partnership on the part of the persons who were

the shareholders of appellant and assent by the shareholders to the transfer of the mill business to the partnership by the managing officers, and to the conduct of the business as a partnership. The uncontroverted evidence adduced by appellant fully satisfied the requirements laid down by the United States Board of Tax Appeals in various cases as to what proof is necessary to show the change of operation of the business from a corporation to a partnership composed of the shareholders. The District Court erroneously concluded that appellant corporation itself owned, controlled and operated the mill business after June 30, 1933, and was subject to taxation on the income therefrom after that date—a conclusion wholly unsupported by the evidence.

ARGUMENT OF THE CASE

PREFACE

This case comes before the Circuit Court of Appeals on an uncontradicted record. It was tried before Judge Cushman sitting without a jury (R. 19) and was thereafter submitted for decision to Judge Black on the written record. He had no opportunity to hear the witnesses nor observe their demeanor on the witness stand. Since it has been held in the case of *Monroe Sand & Gravel Co. v. Sanders*, 79 F.(2d) 292, that the Circuit Court of Appeals is not limited by the trial court's findings and conclusions where the evidence is uncontradicted and where a jury has been waived, and since, in this case, this court has as good an opportunity to determine the weight of the testimony as had the trial court, we have taken the liberty of discussing the evidence in the case at some length.

ARGUMENT

A. The fact that the motive of appellant's shareholders was to minimize taxes does not invalidate their action if it is otherwise lawful.

It was candidly admitted at the trial that the purpose of the transfer of the assets of appellant corporation to a partnership was to reduce taxes. This, however, is immaterial, for such a motive or purpose does not invalidate the action taken so long as it was lawfully accomplished. There is abundant authority for this position. Judge Learned Hand stated the rule in *Helvering v. Gregory*, 69 F.(2d) 809 (1934) :

“We agree with the Board and the taxpayer that a transaction, otherwise within an exception of the tax law, does not lose its immunity because it is actuated by a desire to avoid, or, if one choose to evade, taxation. Anyone may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one’s taxes.” Citing, *U. S. v. Isham*, 17 Wall. 496, 506, 21 L. ed. 728; *Bullen v. Wisconsin*, 240 U.S. 625, 630; 36 Sup. Ct. 473; 60 L. ed. 830.

This case was affirmed by the Supreme Court of the United States on appeal in 293 U.S. 465, 55 Sup. Ct. 266, 79 L. ed. 596. The Supreme Court, speaking through Mr. Justice Sutherland, said:

“The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.”

The Ninth Circuit Court of Appeals is in accord

with this rule. In *Commissioner of Internal Revenue v. Eldridge*, 79 F.(2d) 629, 631, this court said:

"It is argued by the Commissioner that the transfers by respondents to the corporation were made for the purpose of establishing a deductible loss for income tax purposes. This, if true, is unimportant. A taxpayer may resort to any legal method available to him to diminish the amount of his tax liability." Citing *Gregory v. Helvering*, *supra*; *Superior Oil Co. v. Mississippi*, 280 U.S. 390, 395, 50 Sup. Ct. 169, 74 L. ed. 504; *Bullen v. Wisconsin*, 240 U.S. 625, 630, 36 Sup. Ct. 473, 60 L. ed 830; *Jones v. Helvering*, 63 App. D. C. 204, 71 F.(2d) 214, 217.

In *Weeks v. Sibley*, 269 Fed. 155, where it was stated that the sole and compelling motive for the transfer of the assets of a company to a trustee was to minimize taxation, the court said:

"Bearing in mind the rule of construction which the Supreme Court announced in the case of *Gould v. Gould*, 245 U.S. 151, 38 Sup. Ct. 53, 62 Law Ed. 21, and numerous other cases, to the effect that the provisions of the taxing statutes are not to be extended by implication beyond the clear import of the language used, and that they are to be construed most strongly against the government and in favor of the taxpayer, it is the opinion of this court that the right to change the status of an organization or to dissolve an organization, in any legal manner, is not made ineffectual because the motive impelling the change is to reduce or avoid taxation in the future. The right so to do is an incidental right inseparably connected with an individual's right to own and control his property * * *.

"It is not unnatural that any thoughtful business man may take such steps."

Since the motive behind the appellant's transactions in this case is immaterial, the sole and controlling issue for this court's determination is whether or not the appellant earned income subsequent to June 30, 1933. In determining this, the primary question is whether the corporation as a legal entity owned and operated the mill business and was entitled to the income therefrom after June 30, 1933. Thus, whether a partnership was created becomes important, for if a partnership operated the business, of course the corporation did not. However, the issue is not, as was apparently assumed by the trial court (R. 26), whether the partnership existed, but whether appellant received income after June 30, 1933. If appellant divested itself of ownership, and ceased to operate the business on that date, it does not matter whether the owners of the business operated it thereafter under an agreement or not, for it would make no difference to this case whether they were tenants in common with no agreement or whether they operated as partners.

B. The corporation did not own the mill property and business, nor receive income therefrom after June 30, 1933.

The trial court in its opinion and in its findings of fact, conclusions of law and judgment found that appellant corporation owned and operated the mill business and received income therefrom after June 30,

1933 (R. 37-42). We submit, however, that this conclusion is not supported by the evidence.

After meetings duly and lawfully held by the Trustees (R. 62) and by the shareholders (R. 67) the officers of appellant corporation were authorized to and did transfer all of its real property to F. M. Roberts by deed (R. 69). Concurrently, he executed a declaration of trust wherein he recited that he held the property in trust for the persons who were shareholders in the corporation, their interests being in proportion to their stock holdings (R. 76). At the same time the corporation transferred all of its personal property, except its accounts receivable, to the Seattle-Renton Mill Co., a partnership (R. 73). The accounts receivable were retained for two reasons: First, to meet the outstanding accounts payable of the corporation (R. 65) and second, to avoid any criticism by the Bureau of Internal Revenue with regard to gains or losses which might arise with respect to certain of the accounts which were of doubtful value (R. 66), appellant's officers feeling that such gains or losses should be returned by the corporation (R. 66).

After the transfer of the business was accomplished, the property and business which had formerly been operated by appellant were either owned outright by the persons who were shareholders in appellant, or held in trust for their benefit. Thereafter the corporation kept no records of the mill business and, in fact, did not operate it. This in itself would show that whatever income was earned from the business subsequent to June 30, 1933, was not income of appellant, whether a partnership was formed or not.

Operation of the business by some of the tenants in common would, of course, not be improper, and any suggestion that the corporation as such was operating the business subsequent to June 30, 1933, can be based only on inference and innuendo, there being no evidence whatsoever that it was so doing.

C. Operation of the business by a partnership after June 30, 1933, is conclusively shown by the evidence.

As has been pointed out, in the trial below, appellee insisted that no partnership was created because the deed, declaration of trust and bill of sale whereby the business was transferred to the partnership were not recorded; written Articles of Partnership were not executed, and a certificate of assumed business name was not filed. The trial court was of the opinion that no formal contract of partnership was established. None of these objections are significant for, under Washington law which of course controls the nature of the relationships here involved, the existence of a partnership is determined by the intention of the parties and not by the facts just mentioned.

Partnerships may be created by informal unwritten agreements or understandings and the intention to create a partnership may be shown merely by the conduct of the parties. This is true both in suits between partners and third persons and in suits between partners themselves. One of the latest statements of the Supreme Court of the State of Washington on this matter is found in the case of *Stipcich v. Marinovich*, 113 Wash. Dec. 24, at p. 27; 124 P.(2d) 215:

“The principal question to be decided is wheth-

er there was a partnership. In deciding that proposition it is necessary to mention some rules which must be applied. We have said:

“The essential test in determining the partnership relation, is whether the parties intended to establish such a relation; and that, as between themselves, this intention is to be determined by their express agreement, or inferred from their acts and conduct. *Causten v. Barnette*, 49 Wash. 659, 96 Pac. 225.’ *Yatsuyanagi v. Shimamura*, 59 Wash. 24, 109 Pac. 282.

“There is no arbitrary rule by which it may be determined whether a partnership relation existed in a given instance or not. The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties * * *. It is well settled that no one fact or circumstance will be taken as the conclusive test. Where, from all the competent evidence, it appears that the parties have entered into a business relation combining their property, labor, skill and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established.’ *Nicholson v. Kilbury*, 83 Wash. 196, 145 Pac. 189.

“The question of partnership depends upon the intent of the parties as manifested by their conduct, statements, and written contracts. Generally speaking, if such contracts, statements, and conduct establish an intent, and prove a common venture uniting the labor, skill, or property of the parties for the purpose of engaging in lawful commerce or business for the benefit of

all of them, and an agreement to share profits and losses, a partnership is formed. (Citing cases).’ *Constanti v. Barovic*, 199 Wash. 117, 90 P.(2d) 724.

“See, *Purdy & Whitfield v. Department of Labor & Industries*, 111 Wash. Dec. 658, 120 P. (2d) 858.

“As observed from our decisions, the test to be employed in ascertaining the existence of the partnership relation is the intention of the parties to be partners. Intention, in turn, is found in their express agreements, statements, and conduct.”

The leading case on the requisites of a partnership in this state is *Nicholson v. Kilbury*, 83 Wash. 196, 145 Pac. 189, at p. 201:

“ * * * There is no arbitrary rule by which it may be determined whether a partnership relation existed in a given instance or not. The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not necessary that the contract be established by direct evidence. The existence of the partnership may be implied from circumstances, and this is especially true where, as here, the evidence touching the inception of the business and the conduct of the parties throughout its operation, not only tends to show a joint or common venture, but is in the main inconsistent with any other theory.”

The above case is quoted at length by the Supreme

Court of the State of Washington in the case of *Constanti v. Barovic*, 199 Wash. 117, 90 P.(2d) 724, at page 126.

The foregoing cases involved actions between partners. The Supreme Court of the State of Washington has adopted the identical rule in suits between third persons and partners, but in fact requires less proof to establish a partnership where the controversy is between others than the partners themselves, as in the instant case. Thus, in *Collyer v. Egbert*, 200 Wash. 342, 93 P.(2d) 399, in which a creditor sought to recover from partners as such, the court quoted from the cases of *Barovic c. Constanti*, 183 Wash. 60, 48 P. (2d) 257, and *Nicholson v. Kilbury*, 83 Wash. 196, 145 Pac. 189, using from the latter case the same quotation we have set forth above. In *Purdy & Whitfield v. Department of Labor & Industries*, 12 Wn.(2d) 131, 120 P.(2d) 1002, the same quotation was used as stating the applicable rule in determining whether a deceased person was a partner or an employee under the state workman's compensation law.

With regard to the proof required to show a partnership in such cases, the Supreme Court of Washington in *Cruickshank v. Lich*, 158 Wash. 523 at 531, 291 Pac. 485, said:

“As to third persons, less proof is required to show a partnership than as between the parties themselves.”

For the formality necessary to create a partnership agreement, reference is made to the case of *Roediger v. Reid*, 133 Wash. 608, 234 Pac. 452. In that case there was no evidence whatsoever that a contract of partnership had ever been made. In the suit for an accounting

of the partnership property, the court, at page 610, says:

"The question then arises whether a partnership did in fact exist. For the purpose of establishing a partnership, of course, it is a matter of common understanding that no formal contract is necessary. Such a partnership may be made by oral or written agreement, and may result from the acts or conduct of the parties."

Will v. Domer, 134 Wash. 576, 236 Pac. 104, was also a case involving an accounting between partners. In determining whether a partnership existed, the court stated on page 579 as follows:

"They first contend that the testimony fails to show the existence of a partnership for farming and fruit purposes. On this question suffice it to say that a reading of the testimony and the contract heretofore mentioned convinces us that a partnership existed, Domer and wife having an undivided one-half interest therein, the plaintiffs having an undivided one-third interest, and Smith and wife an undivided one-sixth interest. It is true that there is no express provision either in the contract or in the oral testimony to the effect that it was the intention of the parties to form a partnership. But a partnership may arise out of the conduct of the parties, provided it can be determined therefrom that such was the intention, and that it was the intention in this instance that there should be a partnership in the operation of this land, we have no doubt."

In *Causten v. Barnette*, 49 Wash. 659, 96 Pac. 225, (an accounting suit) the court stated at page 664:

" * * * and where, as in this case, an accounting and equitable relief are sought by one who was a

party to the written agreement and who asserts that the same was intended to be, and was, a partnership agreement, it is permissible for the court to receive evidence as to how the parties themselves have construed the written contract as to whether the one disputing the alleged partnership has heretofore treated it as a partnership agreement."

From the foregoing cases, it appears that the rule in Washington is that intention to create a partnership is a primary essential for its existence, and that such intention or the actual existence of the partnership may be shown by the acts and conduct of the parties, and by the interpretation of the parties. The cases furthermore demonstrate that the agreement of partnership may be made most informally. We submit that the facts which we have heretofore discussed, and to which we shall make further reference, conclusively show that the parties having an interest in the appellant corporation intended to and did create a partnership which took over the business of appellant and operated it after June 30, 1933.

The fact that the deed and declaration of trust were never recorded does not defeat their operation, for such instruments are valid, though unrecorded. In 23 R.C.L. 230, Sec. 95, the rule is stated thus:

"At common law, recording was not necessary to the validity of the deed, or to make it effective against all subsequent conveyances; and such is the law now, except so far as the recording acts have expressly, or by necessary implication, limited their effect and operation. *The registry of a deed adds nothing to its effectiveness as a con-*

veyance; all that it accomplishes is to impart notice; and it is a rule of universal application that an unrecorded deed, mortgage or other instrument affecting the title to land is valid as between the parties thereto, and their heirs, and those claiming under the grantee and against everyone else who is not within the protection of the recording acts."

The Washington Recording Act, Rem. Rev. Stat. of Washington, Section 10596-2, does not require such instruments to be recorded. It provides:

"Sec. 10596-2. *Conveyances recorded.* A conveyance of real property, when acknowledged by the person executing the same (the acknowledgement being certified as required by law), *may* be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record. * * * "

Needless to say, there is not involved here the right of a subsequent purchaser or mortgagee. The validity of the conveyance in this case is unaffected by this statute.

Similarly the failure to file a certificate of assumed business name has no bearing on the existence of the partnership, it being merely a condition precedent to a suit by the partnership.

In *Powelson v. Seattle*, 87 Wash. 617, 162 Pac. 329, where, at pages 619 and 620 the court said:

"When the injury occurred, no Certificate of Assumed Business Name had been filed by the Seaport Construction Company. Prior to the commencement of the action, however, a proper certificate had been filed. *The filing of the certificate was not necessary to give a legal existence to the partnership; it was merely a condition precedent to the right to sue and a filing prior to the commencement of the action was sufficient.*"

The cases of *Sutton & Co. v. Coast Trading Co.*, 49 Wash. 694, 96 Pac. 428, and *Union Trust Co. v. Quigley*, 145 Wash. 176, 259 Pac. 28, are in accord with the above rule.

Returning to the evidence in this case, the intention to form a partnership is shown by the acts and conduct of the parties and by their own interpretation. We submit that the evidence in fact shows the agreement itself. Referring to the record, we find at page 53 the following testimony by F. M. Roberts:

"Q Now, you speak of this happening on the 30th day of June, 1933. Had there been any discussion of this change from a corporation to a partnership or sale of the assets prior to that date?

A Yes, the discussion of that began—I couldn't give the date, but in the spring of 1933." (R.53)

And later on the same page we find the following:

"Q You say that discussion started early in 1933. With whom was that matter discussed?

A It was discussed with all of the stockholders who were of age. It was discussed by me

with all of them, except Mr. Carlson's wife and his two children.* We had no formal corporate meetings at which it was discussed, but we were frequently together in groups or I with individuals of the corporation, and I discussed it with them, the purpose of it, and it met with the approval of all of the stockholders." (R.53)

And again on page 57 of the record, we find the following:

"Q What preparations were made by the corporation officers prior to June 30, 1933, preparatory to actually making the transfer to the partnership?

A As I said before, we had discussed the matter; *it met with the approval of all the people interested*, and I then instructed—for instance, Mr. Dougherty, the bookkeeper at the mill, and Mr. Carlson, the manager, informed them of our intent to make this arrangement and asked that they get the books in shape so that we could accomplish this purpose on the last day of June." (R. 57).

On June 15, 1933, a notice was sent to each of the stockholders notifying them that there would be a special meeting of the stockholders of the corporation "to pass upon the question of the sale of the assets of the corporation to a partnership to be formed to take over the same" (R. 59). On page 62 of the record we

*NOTE: Mr. Carlson's wife and children were not in fact the owners of the shares in their names. These shares were owned by Mr. Carlson. See R. 136.

find the minutes of a trustees' meeting held June 30, 1933, in which we find the following:

"After a discussion of this statement (financial statement), it was the opinion of the trustees that the corporation should go out of business, and that the mill and business should be taken over by a partnership composed of the present stockholders." (R.62)

The minutes then recite that a resolution was presented, a portion of which is quoted as follows:

"Resolved, that the Seattle Renton Lumber Company sell to a partnership which will be composed of the same persons who have held stock in the Seattle Renton Lumber Company, and which will be known as the Seattle Renton Mill Co."

" * * * and that the offer of the said partnership to purchase upon the said terms and to assume the mortgage upon the mill plant in the sum of Twenty Thousand Dollars be accepted, and that the President and Secretary of the corporation be authorized to do whatever acts are necessary to complete the said sale." (R.63)

From the minutes of the stockholders' meeting held on the same day, we find the following:

"The Secretary then read to the stockholders the minutes of a meeting of the Trustees which had just been held, said minutes setting forth a resolution of the Trustees under which the real estate and all tangible personal property of the mill, a corporation, was to be sold to a partnership composed of the stockholders in the mill, the partners to contribute to the new partnership the dividends received from the mill. After reading the said minutes, it was moved, seconded and

carried that the action of the Trustees in selling the mill property and in the declaration of a dividend be approved. The same received the unanimous vote of all stock represented at the meeting.” (R.68)

In the bill of sale from the Seattle Renton Lumber Company executed on June 30, 1933 (R. 73), we find that the vendee therein was the “Seattle Renton Mill Co., a partnership.” In the declaration of trust executed by F. M. Roberts (R. 76) we find a list of the persons who were formerly shareholders in the corporation, and we find in the statement made:

“I further declare that I have taken said title at the request of the persons interested in said real estate, *who are partners as the Seattle Renton Mill Co.*” (Italics our own). (R. 78).

As shown from this evidence and from their subsequent conduct, the parties intended a partnership as of the date the mill business was transferred from the corporation. The trial court in its oral decision seemed to feel that the agreement was merely that a partnership would come into existence at some future date. We believe, however, that a more logical interpretation is that the parties intended the partnership to begin functioning as of the date when they all contemplated that the business would be transferred to it.

Although the trial court was of the opinion that there was no executed contract of partnership, there was no question but that the various shareholders knew of the contemplated change in the operation of the business from a corporation to a partnership. This, in itself, arguably is all that is necessary to bind

them as shareholders. In *Robinson v. First National Bank of Marietta* (Supreme Court of Texas) 98 Tex. 184, 82 S.W. 505, the court was of the opinion that whether or not shareholders would be bound as partners where the business was operated as a partnership depended upon the knowledge and assent of the shareholders. At page 507 of the Southwestern Reporter the court stated the rule as follows:

“On the other hand, if the stockholders of the corporation agreed to cease doing business as a corporation, and to carry it on as a partnership under the name of Saxon, Pierce & Co., all would be bound for the debt.”

The case of *Quick v. Pevehouse* (Texas) 41 S.W. (2d) 635, seems to go a little further and hold that knowledge of the shareholder is all that is necessary to bind him where the corporate business is subsequently operated by a partnership. In that case the shareholders of Lubbock Grain & Feed Co., a corporation, continued to do business but used the name of Yellow House Mills. While they were so doing the plaintiff sold certain goods to the Yellow House Mills and thereafter instituted this action to recover from the shareholders on the theory that they were operating a partnership under that name. The evidence was uncontradicted that the original corporation had never been dissolved and it showed that the defendants owned all the stock therein. The court said that it felt that the case of *Robinson v. First National Bank of Marietta*, 98 Tex. 184, 82 S.W. 505, was authority for judgment against Dickinson, one of the defendants.

From the following quotation it appears that share-

holder Dickinson was bound as a partner because the corporate business was being operated as a partnership simply because he had knowledge of how the business was being conducted and made no objection to it:

“According to the testimony of Dickinson, a similar condition exists in the instant case. The old corporation had not been dissolved, but the three original stockholders were trying to wind it up and pay off its debts in order to avoid bankruptcy. They were keeping its business transactions and its bank account separate from the new company. The new company was being operated in a rather unusual manner, in that its funds were deposited to the individual account of Quick and its checks drawn in the name of Yellow House Mills were, it seems, paid out of that account. *If Dickinson, Sr. had no knowledge of how the business was being conducted, he would have occupied the position of Robinson and Hoskins in the Robinson case; but he says he was the president of the old corporation and knew how the account of the Yellow House Mills was being handled.* According to his testimony, the Yellow House Mills was, in law, a partnership and under the general rule that each partner is an agent of the firm, authorized to represent it in the business for which it was organized, judgment was properly rendered against Dickinson.”

We submit that there can be absolutely no question in this case but that all the persons who owned stock in the appellant corporation knew of the transfer of the business from the appellant corporation to the partnership and made no objection to it.

D. Appellant adduced sufficient evidence under the rules laid down by the Board of Tax Appeals for income tax cases to show that the mill business had been transferred to a partnership.

It is not surprising that the transfer of a business from a corporation to a partnership is often resorted to in order to reduce income taxation. The average individual engaged in business will carefully balance the value of the limited liability afforded by a corporation with its cost in the form of taxation. When the taxes increase beyond a given point it will be found advantageous to abandon the corporate organization and operate the business as a partnership. The Board of Tax Appeals has on three occasions considered this type of transfer and has indicated the type of evidence necessary to show that the change in organization has been accomplished. The earliest case is that of *Rice-Sturtevant Automobile Company v. Commissioner of Internal Revenue*, 6 B.T.A. 793. In that case the corporation executed a bill of sale to the sole owners of the corporation giving them the right to use the corporate name and conduct the business. Thereafter the business was operated exactly as before with no notice given to any person of the purported change. The Board noted that the sole issue in the case was whether or not the partnership was formed on a certain day and held the evidence insufficient, saying as follows:

“No books of account of the partnership or of the corporation were produced, no part of the record of the bank in which it is claimed that two separate accounts were kept was produced, none of the cancelled checks of the so-called part-

nership were produced, none of its letterheads or of the letters sent out by it were produced, nor is the absence of any evidence of such a collateral nature which might have supported the contention of the petitioner excused in any way.

"The record is not convincing that there was in fact any *bona fide* delivery of the bill of sale which was executed on July 31, 1919, or any *bona fide* transfer of the assets named, or that the business was in fact carried on by the partnership and not by the corporation."

By contrast, however, in our case we find that the name of the business under which the mill was operated was changed to Seattle-Renton Mill Co. (R. 52, 97, 98, 102), all interested persons were notified that the business had changed to a partnership (R. 151-152). The signs on the mill building and on its equipment were changed to show the name of the partnership (R. 98, 151). Separate accounts of the partnership and of the corporation were kept (R. 112, 152), separate bank accounts were opened (R. 95), and new signature cards were delivered to the bank (R. 97). Cancelled checks of the partnership were produced (R. 148, 150, 157-161), as well as its invoices, both of which showed the change in the name of the business as of July 1, 1933 (R. 119-123). Furthermore, contrary to the *Rice-Sturtevant* case, there is no question here but that there was a *bona fide* delivery of the bill of sale and deed, and, as was stated by the court in its oral opinion, it is apparent that there was a *bona fide* attempt by the persons interested in the said business to carry it on as a partnership rather than as a corporation (R. 34).

Again in *Hinz and Landt, Inc. v. Commissioner of*

Internal Revenue, 8 B.T.A. 375, certain shareholders of a close corporation, after a regular meeting of the shareholders, met and informally agreed that they would form a partnership to take over the corporate business on January 1, 1920. Nothing was done, however, until May 17, 1920, at which time an offer from the partners, who were the shareholders of the corporation, to purchase all of the corporation's assets was approved and a bill of sale was executed and delivered on that day transferring all of the assets of the corporation to the partnership. There was no question in this case but that after May 17, 1920, the income earned from the business belonged to the partnership. The question in the case was with regard to the income earned between January 1 and May 17. In discussing the case the Board said on page 378:

"It may be conceded without discussion that, as suggested by the petitioner, no particular form of contract is necessary to the creation of a valid partnership, and that the contract may be oral or written. We may even concede for the purpose of this opinion that the several stockholders of the petitioner did at the informal meeting of September 25, 1920, and shortly thereafter enter into a valid partnership agreement, but the formation of the partnership was not of itself sufficient to vest it with title to the petitioner's assets, and whether it acquired the petitioner's business on January 1, 1920, or at a later date, is a question of fact to be determined from the evidence * * *. The evidence shows that during the period in question the business was conducted under the corporate name, all purchases were made in the name of the corpo-

ration and were paid for with its checks duly signed by its Treasurer. The evidence further shows that as late as February 28, 1920, the Board of Directors contemplated an increase of the corporation's capital stock and actually called a stockholders' meeting for that purpose. * * * The petitioner continued after that date and until May 17, 1920, to hold the title thereto and to hold itself out to the world as the actual owner, and all of the circumstances surrounding the conduct of the business support the conclusion that it was, in fact, the owner, and the respondent properly taxed to it the income involved herein, and we so hold."

Apparently the objection to the transaction involved in the foregoing case was that there had actually been no transfer of legal title to the partnership prior to May 17, 1920, and that the corporation continued to hold meetings, to hold itself out to the world as a corporation, and to buy and sell goods in its own name. However, after the execution of the bill of sale of the property to the partnership, there was no question as to the taxability of the income to it. Quite contrary to that case, the Seattle Renton Mill Co. operated the mill in its own name, all purchases were made in its name, all checks were made out by it. It held itself out as being a partnership and, in fact, actually held title to the property. Furthermore, the corporation did nothing with respect to the business after June 30, 1933 (R. 100).

In *Royal Wetwash Laundry Inc. v. Commissioner of Internal Revenue*, 14 B.T.A. 470, Mr. and Mrs. Greenberg and Mr. and Mrs. Steinman owned all the stock in a corporation doing a laundry business. For

the purpose of reducing income taxation, the corporation, at a regular meeting, passed a resolution that the business be transferred to a partnership composed of Mrs. Greenberg and Mrs. Steinman. This resolution was passed on January 2, 1920. However, the bill of sale and lease of the building and equipment and the certificate of assumed name of the partnership were neither executed nor filed until May 31, 1921. In the meantime, Mr. Greenberg was manager and bookkeeper of both the corporation and the partnership and kept all accounts of both concerns in books which had been used by the corporation, and at the close of the year credited the partnership with the profits disclosed by the only profit and loss account that had been kept. In 1921, at the time of making income tax returns, he opened new books and thereafter kept the accounts separate. Yet the Board held that the income earned subsequent to January 1, 1920, belonged to the partnership, saying as follows:

“The partnership agreement was executed on January 2, 1920. On the same date the petitioner, by appropriate corporate action, transferred its business and certain of its property to the partnership. The fact that no bill of sale was given at that time is not material since the transfer was complete and effective without being evidenced by such an instrument, which is no more than a record of the transaction already effected * * * Failure to file a certificate stating the true ownership of a business conducted under a trade name may have subjected the parties to penalties under the laws of Minnesota, but we fail to see that such negligence in any way affected either the transfer of the

laundry business or the ownership, and the taxability of the income derived therefrom. As the Commissioner conceded that the partnership was effective on and after May 31, 1921, it is apparent that he refused to recognize its existence prior thereto solely because a bill of sale was given and the certificate of information was filed on that date. We are satisfied with the evidence that the partnership was effective at and after January 2, 1920, and that the income here involved was its income."

It is submitted that all of the essential evidentiary facts called for in these three cases have been met in our own. In fact, none of the cases shows as strong a record as that presented here. The rule apparently adopted by the Board of Tax Appeals is that the income from a business is to be returned by that organization which is, in fact, operating it. That the mill business here involved was not operated by the appellant corporation is amply supported by the evidence.

CONCLUSION

This case is presented to the court on an uncontradicted record which shows acts, conduct, understanding and intention on the part of the persons who were shareholders of appellant to operate the business as a partnership. Under Washington law the existence of a partnership depends upon intention, as shown by those facts. The evidence shows that all of the operating equipment and inventory was transferred to the partnership from the corporation and there is no evidence whatever that appellant corporation earned

any income from the operation of the business subsequent to June 30, 1933. We submit that the conclusion of the District Court that appellant corporation did receive income from the operation of the business after June 30, 1933, as shown by that court's findings of fact, conclusions of law and judgment, is erroneous in that it is not supported by the evidence and is contrary to law.

We respectfully submit that the judgment of the trial court should be reversed.

WETER, ROBERTS & SHEFELMAN,
Attorneys for Appellant.

No. 10274

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a corporation,

Appellant

vs.

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NORTHERN DIVISION

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STATUTES:

Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 22	3
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MISCELLANEOUS:

Ballantine, Manual of Corporation Law and Practice (1930):	
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Sec. 59	20
Sec. 166	23
Sec. 167	23
Sec. 168	23

2 Mertens, Law of Federal Income Taxation (1942):	
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6 Mertens, Law of Federal Income Taxation (1942):	
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No. 10274

IN THE

**United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT**

SEATTLE RENTON LUMBER COMPANY,
a corporation,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE LLOYD L. BLACK, *Judge*

BRIEF FOR THE APPELLEE

OPINION BELOW

The District Court did not render a written opinion in this case; its oral decision will be found at pages 17 - 36 of the Record.

JURISDICTION

This appeal involves income and excess profits

tax deficiency assessments made by the Commissioner of Internal Revenue against taxpayer, a Washington corporation, in the principal amounts of \$2,772.90 and \$874.39, respectively, for the calendar year 1933, which amounts, together with interest thereon were paid by taxpayer to the Collector of Internal Revenue at Tacoma, Washington, on May 11, 1936. (R. 4, 37-38.) Claim for refund therefor (R. 4-9) filed November 6, 1936, was rejected by the Commissioner, taxpayer being notified of such rejection by letter dated April 9, 1937 (R. 38-39).

On March 12, 1938, taxpayer instituted an action for recovery of taxes paid against the United States under the provisions of Section 24, Twentieth, of the Judicial Code as amended, in the District Court for the Western District of Washington, Northern Division. (R. 2-11) The judgment of the court denying the claim was entered August 20, 1941. (R. 42-43) Taxpayer's motion for new trial filed August 27, 1941, was denied July 13, 1942. (R. 34-36.) Within three months and on August 25, 1942, taxpayer filed notice of appeal to this Court pursuant to the provisions of Section 128(a) of the Judicial Code as amended. (R. 43-44.)

QUESTION PRESENTED

Whether under the circumstances of this case the income realized from operation of the business subsequent to June 30, 1933, was properly taxable to taxpayer corporation as a part of its income for the 1933 calendar year.

STATUTE INVOLVED

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—“Gross income” includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

STATEMENT

The facts as here stated are summarized from the findings and oral decision of the District Court (R. 17-34, 37-40), from admitted allegations of the pleadings (R. 2-16), and from evidence adduced by

¹ Including Government's cross examination of taxpayer's witnesses.

taxpayer (R. 50-167)¹ which was not controverted.

Taxpayer is a Washington corporation. (R.2.) It incorporated in 1929 and thereafter engaged continuously in the manufacture and sale of lumber. (R. 20.)

In 1933, the taxable year here concerned, its 900 shares of outstanding stock were held by approximately 14 stockholders. F. M. Roberts owned about 237 2/3 shares, James C. Carlson about 215, James P. Weter about 211, and C. A. Shinstrom held 100 shares. The balance of 136 shares was divided among about 10 other persons, their proportionate interests varying from one share to 37.² With the exception of the stock appearing in the name of James C. Carlson, some small amounts in the names of his wife and two children, and the stock held by James P. Weter, all of the stockholders were relatives by blood or marriage of F. M. Roberts. (R. 20, 104-107.) James P. Weter and F. M. Roberts were law partners. (R. 60.)

² Although reference is made (R. 105) by Government counsel to the list of stockholders as of June 30, 1933 (the date of the hereinafter-mentioned alleged formation of the partnership and purported transfer to it of the corporate assets), such list was not made a part of the record and the testimony of taxpayer's witness, F. M. Roberts, does not furnish an accurate inventory of the stockholding interests (R. 104-107). The exact interest of each stockholder, however, is not material to the issue.

The board of trustees of taxpayer was composed of James C. Carlson, president and acting manager, F. M. Roberts, secretary and treasurer, and James P. Weter. (R. 20.)

Sometime in the early part of 1933 F. M. Roberts discussed with various stockholders the advisability of operating the business as a partnership instead of in corporate form, in order to reduce tax liability. (R. 21.) All of the stockholders were consulted by Mr. Roberts with the exception of Carlson's wife and two children. With the exception of Roberts' conversations with stockholder Rex Swan, the discussions were informal in character and concerned merely the purpose of the proposed change. The plan met with the approval of all of the stockholders with whom it was discussed. (R. 21-22.)

It was the practice of the corporation to take inventory at the close of business June 30 and December 31 of each year, and to take off a profit and loss statement at that time. (R. 22.)

Under date of June 15, 1933, the following notice was mailed to all of the stockholders (R. 22):

Bryn Mawr, Washington, June 15, 1933
To the stockholders of the Seattle-Renton Lumber Company:

You are hereby notified that there will be a

special meeting of the stockholders of this corporation held at the mill office at three P. M., June 30, 1933, to pass upon the question of the sale of the assets of the corporation to a partnership to be formed to take over the same.

(Signed) R. F. M. ROBERTS, Secretary.

On June 30, 1933, taxpayer's board of trustees held a meeting, the minutes of which recite the following (R. 62-64):

A meeting of the Trustees of the Seattle Renton Lumber Company was held at the mill office on June 30, 1933, there being present James P. Weter, James C. Carlson and F. M. Roberts. The minutes of the last meeting of the Trustees were read and approved, after which a financial statement of the corporation was presented for the consideration of the Board, the said statement appearing after these minutes in the minute book.

After a discussion of this statement it was the opinion of the Trustees that the corporation should go out of business, and that the mill and business should be taken over by a partnership composed of the present stockholders. It was at first deemed advisable to turn over everything to such a partnership, but after discussion it was decided that the corporation should retain its Accounts Receivable and the following Resolution was then presented:

Resolved that the Seattle Renton Lumber Company sell to a partnership, which will be composed of the same persons who have held stock in the Seattle Renton Lumber Company and which will be known as the Seattle Renton Mill Company, all of its real estate and tangible personal property of every description at the figures the same are now carried upon the books of the cor-

poration, less the depreciation reserve; and that the offer of the said partnership to purchase upon the said terms and to assume the mortgage upon the mill plant in the sum of \$20,000.00 be accepted, and that the President and Secretary of the corporation be authorized to do whatever acts are necessary to complete the said sale. Further, that at the same time said sale is consummated, a dividend be declared of the total amount realized from such sale, to-wit, \$118,662.56. That of the said amount \$1368.43 represents actual earnings, and will be a dividend in the proper sense of the word, and that the balance be shown as a liquidating dividend, the same being used first to liquidate the paid-in surplus, and thereafter on account of capital. That the book entries for the said sale and the declaration of the said dividend shall be as follows:

Real Estate.....	\$ 30,000.00
Mill and equipment.....	101,763.64
Mack truck	5,500.00
2nd hand Mack	345.00
Ford Coupe	669.00
Boat	1,773.12
Roadway	1,701.07
Office Equipment	580.48

	142,332.31
Less depreciation reserve	20,086.92

Carried fwd.	122,245.39
Brought fwd.	\$122,245.39
Lumber inventory	8,627.23
Log inventory	7,734.94
Supplies inventory	55.00

	\$138,662.56

Mortgage (assumed by buyers)	20,000.00
Dividend (undivided profits). .	1,368.43
Surplus (paid in)....	32,500.00
Capital	84,794.13
	\$138,662.56

Passage of the Resolution was moved, seconded and unanimously carried.

Thereafter the Treasurer was instructed to pay a 5% tax upon the said dividend, and to report the same as required by law.

On motion the meeting adjourned.

F. M. ROBERTS
Secretary

The minutes of the stockholders' meeting, also held June 30, 1933, recite as follows (R. 67-68):

Bryn Mawr, Washington
June 30, 1933.

A special meeting of the shareholders of the Seattle-Renton Lumber Co. was held at the mill on the above date, the following stock being personally represented:

C. A. Shinstrom	100 shares
James C. Carlson	230 shares
F. M. Roberts	212 shares
James P. Weter	222 shares

The call for the meeting was read, and it was then stated that a quorum was present.

The Secretary then read to the stockholders the minutes of a meeting of the Trustees which had just been held, said minutes setting forth a

resolution of the Trustees under which the real estate and all tangible personal property of the mill, a corporation, was to be sold to a partnership composed of the stockholders in the mill, the partners to contribute to the new partnership the dividends received from the mill. After reading the said minutes, it was moved, seconded and carried that the action of the Trustees in selling the mill property and in the declaration of a dividend be approved. The same received the unanimous vote of all stock represented at the meeting.

On motion the meeting adjourned.

F. M. ROBERTS
Secretary

Only James C. Carlson, James P. Weter and F. M. Roberts attended either meeting. (R. 30-31.) The meetings were not held at the mill office as stipulated in the notice to stockholders and as recited in the minutes, but were held at the Seattle law office of Messrs. Weter and Roberts. (R. 23.)

At the time of the aforementioned trustees' and stockholders' meetings the following bill of sale was executed by Carlson as president and Roberts as secretary of taxpayer corporation, Seattle-Renton Lumber Company, in terms as follows (R. 23, 73-74):

Know All Men by These Presents:

That Seattle-Renton Lumber Co., a corporation the party of the first part, for and in consideration of the sum of Ninety-Eight Thousand Six Hundred Sixty-Two and 56/100 Dollars, lawful money of the United States of America to it

in hand paid by Seattle-Renton Mill Co., a partnership, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said party of the second part, its successors and assigns all machinery and equipment contained in or about the mill building and premises of the grantor at Bryn Mawr, Washington, together with two Mack trucks, one Ford coupe, one power boat "Peacock", office furniture and equipment, and all lumber, logs and supplies on hand at the said mill premises. The intention of this bill of sale is to pass title to all tangible personal property of the vendor, but including no intangible personal property of any nature or description.

To Have and to Hold the same to the said party of the second part, its successors and assigns forever. And the said grantor does for its successors and assigns, covenant and agree to and with the said party of the second part, its successors and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, its successors and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, we have hereunto set our hands and seals the 30th day of June in the year of our Lord one thousand nine hundred and thirty-three.

Signed, Sealed and Delivered in Presence of
[Seal] SEATTLE-RENTON LUMBER CO.
[Seal] By JAS. C. CARLSON
Pres.

[Seal] And By F. M. ROBERTS
Sec.

[Acknowledgement omitted.]

The corporation's accounts receivable were not included in the transfer. (R. 65-66.)

On the same day a warranty deed to the real estate on which the mill was located was executed to F. M. Roberts. It recited that it was made "in consideration of \$40,000, of which \$20,000 is by the assumption of the hereinafter described mortgage." The deed, like the bill of sale, was signed by Carlson as president and Roberts as secretary of the corporation. Except as above stated, the deed did not mention or describe any mortgage. (R. 23-24, 69-71.)

Roberts executed a declaration of trust the same day (R. 24) which read as follows (R. 76-79):

I, F. M. Roberts, do hereby acknowledge that I have this day received a conveyance from the Seattle-Renton Lumber Co. of the following described real estate situated in King County, Washington, to-wit:

Block "B" of Lake Washington Shore Lands as modified in Cause No. 156371 of the Superior Court of King County, in the County of King, State of Washington; Also

Beginning at the intersection of the Easterly line of the Seattle Renton and Southern Right of Way with a line 2 feet South of North line of Lot 1 in Block 27 of Bryn Mawr, in the County of King, State of Washington, as per map thereof recorded in Volume 5 of Plats, page 58, in the office of the County Auditor of said County; thence

Southeasterly along said Easterly line of Seattle-Renton and Southern Right of Way to the intersection of the Southerly line of Juniper Street (Keats Avenue) as shown on said plat (now vacated); thence East along the South line of said street to the West margin of Black River Waterway as established in Cause No. 156371 of the Superior Court of King County, Washington; thence North $2^{\circ} 40' 09.5''$ East along the West margin of said waterway to a point South $88^{\circ} 27' 28''$ East of the point of beginning; thence North $88^{\circ} 27' 28''$ West to the point of beginning.

I further acknowledge that I received said conveyance in trust for the following named persons in the following proportions:

James C. Carlson	230/900
James P. Weter	211/ "
C. A. Shinstrom	100/ "
R. C. Swan	10 "
Estelle Roberts	23 2/3 "
Helen R. Shinstrom	26 2/3 "
J. M. Roberts	19 "
Edith S. Roberts	37 "
Ruth Roberts	1 "
Mary Roberts	1 "
For Myself	237 2/3 "

I further declare that I have taken said title at the request of the persons interested in said real estate, who are partners as the Seattle Renton Mill Co., for the reason that it would be cumbersome to have the title to said real estate in the names of all of the said persons. I hereby agree to be bound by the decision of the said persons for whom I hold title in trust, as to the handling of the said title, and agree upon request to convey

the same to them, or to any other person to whom I shall be directed to make conveyance. I further declare that I have no interest in said property except only the interest as set forth in this Declaration of Trust.

In Witness Whereof, I have hereunto set my hand this 30th day of June, 1933.

[Seal] F. M. ROBERTS
[Acknowledgement omitted.]

Neither the bill of sale of the equipment nor the declaration of trust was ever filed. Both were kept by Roberts. The deed to the real property was filed for record January 2, 1936. (R. 24.)

After June 30, 1933, on signs and stationery the word "Lumber" in the company's title was changed by stamp or ink to "Mill," so that the name of the company read "Seattle-Renton Mill Company" instead of "Seattle-Renton Lumber Company." Whether Seattle-Renton Mill Company was or was not a corporation was not indicated. In the fall of 1933 10,000 checks were printed for the Seattle-Renton Mill Company, which through a mistake in printing contained blanks for the signatures of the president and secretary. The checks were used, however, despite the mistake. (R. 24-25.) An account was opened in the First National Bank of Kirkland, Washington, as of July 3, 1933, in the name of Seattle-Renton Mill Com-

pany. The signature card on this account read as follows (R. 97):

Below please find signature (s) which you will recognize in payment of funds or the transaction of other business on my (or our) account with The First National Bank of Kirkland, Wash.

Seattle-Renton Mill Co.

Signature of By Jas. C. Carlson or By F. M. Roberts or By V. Dougherty.

Address Bryn Mawr, Wn.

Introduced by

Date Jul. 3, 1933.

Seattle-Renton Mill Co.

There were no written articles of partnership. There was no written or published notice of the formation of a partnership and no filing in the auditor's office of a certificate of an assumed business name. (R. 25.) Roberts had been or was at this time interested in various other business enterprises, in common with some of the stockholders of taxpayer. (R. 51, 54, 55, 56.) In several of these enterprises, including his association with Weter in the practice of law, the business was carried on as a partnership without formal articles. (R. 56-57.)

Carlson continued as manager of the mill operations, and at practically the same salary he received before 1933. Customers of the mill who telephoned as

to the reason the company name had been changed from Seattle-Renton "Lumber" to Seattle-Renton "Mill" were told the company had become a partnership, without being told the names of the partners and without any further explanation. Except for the mortgage, the payment of the company's indebtedness was on a current basis. The Seattle-Renton Lumber Company, a corporation, continued to exist as such, paying its annual license fees to the State of Washington. (R. 25.)

In 1934 the purported partners included the earnings of the business during the last six months of 1933 in their income tax returns as their individual income. (R. 25.) Taxpayer corporation returned as corporate income only the earnings for the first six months of 1933. The Commissioner of Internal Revenue assessed a deficiency against taxpayer corporation for the year 1933 on the ground *inter alia*³ that there was no partnership *in esse* as of July 1, 1933, and that the entire income of the year was includable in the corporate return and taxable to the corporation. (R. 168-175.)

³ The correctness of deficiencies based on other grounds has been conceded by taxpayer. (R. 3.)

Taxpayer paid the amount of the assessment under protest and duly filed a claim for refund, asserting that the income in question was not taxable to the corporation (R. 4-9), and upon the rejection of the claim instituted this suit for refund. The court determined that the taxpayer operated the business on the same basis after June 30, 1933, as it did prior thereto, that there was no partnership formed by the stockholders prior to or on June 30, 1933, or at any time prior to January 1, 1934, that the steps taken to change the form of the organization for the purpose of avoiding income taxes were not sufficient to effectuate a termination of corporation ownership and operation and to supplant the corporation by a different owning and operating organization. (R. 39.) The Commissioner's action was upheld, the court stating in its opinion that taxpayer had failed to sustain the burden of proving the existence of a partnership which operated the income-producing business subsequent to June 30, 1933. (R. 17-34.)

SUMMARY OF ARGUMENT

Under the revenue laws income is normally taxable to the person who earns it, or to the owner of the property which produces it.

It is neither unlawful nor reprehensible for the owners of a business operating as a body corporate to transfer the assets and carry on thereafter as individuals, partners, or in some form other than corporate organization, with a view to reducing or avoiding liability for taxes. But such transition must be effected in fact to be effective for federal tax purposes. And where the change is actuated solely or chiefly by tax considerations its accomplishment is to be scrutinized with particular care.

The minimization of tax liability was concededly the motivating force in the case at bar; there was no business purpose. And the evidence furnishes more than substantial support for the findings of the court below that no partnership was in fact formed and no transfer in fact effected on June 30, 1933, as taxpayer claims. At best the evidence shows only that the interested parties intended to form a partnership which would take over and operate the business of the corporation. But the intention was not then consummated; and until such purpose was a *fait accompli*, the income continued taxable to the corporation. Accordingly the court below was correct in denying to taxpayer the refund it claimed.

ARGUMENT

TAXPAYER CORPORATION FAILED TO PROVE THAT THE INCOME HERE CONCERNED RESULTED FROM OWNERSHIP AND OPERATION OF THE BUSINESS BY ANYONE OTHER THAN ITSELF

The issue of the case is to whom shall be taxed the income realized from operation of this mill business subsequent to June 30th of the taxable year. By and large, income is taxable to the person who earns or otherwise creates the right to receive it, or who is the beneficial owner of the property which produces it. See *United States v. Joliet & Chicago R. Co.*, 315 U. S. 44; *Helvering v. Eubank*, 311 U. S. 122; *Helvering v. Horst*, 311 U. S. 112; *Burnet v. Leininger*, 285 U. S. 136; *Lucas v. Earl*, 281 U. S. 111; *Daugherty v. Commissioner*, 63 F. (2d) 77 (C.C.A. 9th); *Villere v. Commissioner* (C.C.A. 5th), decided February 16, 1943 (1943 C.C.H., par. 9291); *Covington v. Commissioner*, 103 F. (2d) 201 (C.C.A. 5th); *McDonald Coal Co. v. Lewellyn*, 16 F. (2d) 274 (C.C.A. 3d); 2 Mertens, Law of Federal Income Taxation (1942), Section 18.02, Sections 17.01 *et seq.*

Taxpayer contends that it did not earn the income which the Commissioner of Internal Revenue taxed to it and that it was not the owner of the property from

which that income was derived. The taxpayer's claim is that on June 30th of 1933 it transferred all of the mill property to a partnership composed of its stockholders; and it was the partnership which operated the business during the last six months of the taxable year.

To these contentions the Government answers, as did the court below, that no valid transfer of assets was made on June 30, 1933; the alleged partnership transferee was not in existence at that time.

It is well settled that in the absence of statute a majority of the stockholders of a corporation have no power to sell and convey its entire property and discontinue its business, if the sale is not required by the exigencies of the business; there must be unanimous consent of the stockholding interests to any such sale. Neither the directors nor a majority of the shareholders of a going concern, nor both together, have power unless statutorily granted, to dispose of even so much of the corporate property as will render the company unable to continue in business. See *Des Moines Life & Annuity Co. v. Midland Ins. Co.*, 6 F. (2d) 228 (Minn.); *American Seating Co. v. Bullard*, 290 Fed. 896 (C.C.A. 6th); *Jones v. Missouri-Edison Electric Co.*, 144 Fed. 765 (C.C.A. 8th); *People v. Ballard*,

134 N.Y. 269; *Kean v. Johnson*, 9 N.J. Eq. 401; Ballantine, Manual of Corporation Law and Practice (1930), Section 59.

Examination of the statutes of the State of Washington relating to corporations fails to disclose any grant of power in corporate directors or majority stockholders to convey corporate assets in their entirety. But we have here a purported bill of sale covering all of the personal property owned by the corporation except its accounts receivable, and a deed of conveyance to all of its real property, with nothing whatsoever in the record showing that the exigencies of this business demanded the cessation of operations, or that the transfers were made under unanimous consent of the stockholding interests. The bill of sale and deed were executed pursuant to resolution by the board of trustees taken at its meeting June 30, 1933; the resolution recited that *in the opinion of the board* the corporation should go out of business. (R. 62.) The minutes of the stockholders' meeting held that same day declare that the resolution received the unanimous vote of all stock "represented." (R. 68.) There were present at the meeting only three of the fourteen shareholders, and these three comprised the board of trustees which drafted the resolution. (R. 28.) The stock "represented" was their own; no

contention is made that the stockholders present held proxies from the stockholders absent.

Nor had the "transfers" been previously approved by the absent stockholders. It is true that F. M. Roberts, one of the officer-trustees who executed the instruments on behalf of the corporation, had held some discussion with the other shareholders concerning the matter prior to the meeting where the "transfers" were executed. But the conversations admittedly did not extend beyond the *advisability* of forming a partnership to take over the assets and operate the business in order to minimize tax liability; the discussions were in the most general of terms and quite clearly did not deal at all with any details of the proposed transaction. With the possible exception of the stockholder Swan, none of the other stockholders seemingly were given opportunity to consent or indeed any information whatsoever as to the manner or means by which the stated objective was to be accomplished. (R. 21, 53-54.)⁴

It is difficult to see how under such circumstances they may be said to have consented in advance to the particular means which Carlson, Roberts, and

⁴ It does not appear that Carlson's wife and two children, who were record stockholders, were even apprised of the purpose of the contemplated transfer.

Weter saw fit thereafter to adopt at a meeting which those three alone attended.⁵ It seems plain that in attempting to convey away almost the whole of the corporate assets the three stockholders assumed a power which they did not have, and that their action was accordingly a nullity.

But even if these majority stockholders had power to authorize a valid transfer of the corporate assets without the consent of the others or with such "consent" as appears here, still, we submit, their attempted action was ineffective. For the stockholders' meeting was itself an invalidity. In the notice which was mailed to the stockholders, the place of meeting was described as the "mill office" (R. 59); the minutes of the meeting declare that it was held there (R. 67), but the evidence is clear that actually it took place in the law office of Weter and Roberts,

⁵ For example, the amount, method of payment, and distribution of the consideration for the "sale" appears to have been decided upon at the meeting. Likewise, it was after the discussion held there that the three stockholders present determined that taxpayer should retain its accounts receivable and not include them in the "sale." (R. 62-68.) The arrangement that the deed to the real property should run to Roberts as grantee was also made at the meeting of June 30, 1933. (R. 72.) Obviously all of these things were matters of major importance in the transaction to which the consent of stockholders informed only of the objective to be accomplished cannot be assumed.

some eight miles from the mill (R. 65). It is elementary that stockholders' meetings must be held at the time and place of notice given in order to give validity to action there taken. What is done at a meeting held elsewhere than at the place stated in the notice cannot bind stockholders who are not present and who do not participate. See Ballantine, Manual of Corporation Law and Practice (1930), Sections 166, 167 and 168. We do not have here any evidence of waiver of this defect by the eleven absent stockholders, nor any consent by them to the action which was taken at the illegal meeting except again such consent as may be implied from their failure affirmatively to object and their subsequent inclusion on their individual tax returns of the company earnings during the last six months of 1933.

We direct attention, too, to the defect in the in-

Perhaps subsequent acquiescence of the stockholders to the transfer in all its details is to be implied by their acts in returning as their individual income the earnings of the business during the last six months of 1933. But these returns were presumably filed in March of the year following, and certainly they could not serve, we submit, as consents relating back to the date the instruments were executed, to prevent the Federal Government from claiming against one who in the absence of a valid transfer would clearly be taxable as the owner of the property producing the income.

strument of conveyance itself. The deed to the real estate recites as a part of the consideration therefor, assumption by the grantee of the "herinafter described mortgage" (R. 69), but as the court below pointed out (R. 24), the deed does not mention or describe any mortgage except in those terms. And as for the cash consideration stated in deed and bill of sale, there is no evidence whatsoever to show that the "transferee" paid it or any part of it, except the recitations of the instruments themselves. (R. 69, 73.) The court below was well advised it would seem in describing the transaction as not an "actual sale" but "at most merely a liquidating dividend." (R. 31.)

Even the transferee was chimerical; the purported partnership simply was not then in existence. True, the transfers run to a "partnership," but it takes something more than the empty use of words to create that status. For income tax purposes, a partnership exists or does not exist; it is not to be "created." A taxpayer does not escape liability by conjuring up another taxpayer. See 6 Mertens, Law of Federal Income Taxation (1942), Sections 35.04, 36.08. And the revenue law prescribes its own tests for the existence of a partnership; local law is not controlling. *Wholesalers Adjustment Co. v. Commis-*

sioner, 88 F. (2d) 156 (C.C.A. 8th); *George Brothers & Co., v. Commissioner*, 41 B.T.A. 287; 6 Mertens, Law of Federal Income Taxation (1942), Section 35.02.

In its essence, the formation of a partnership is, of course, a matter of contract law; the minds of the contracting parties must meet. There is no showing that they had met here at the time the purported transfer was made to the alleged partnership; the evidence is that they had not. Clearly the partnership was *in futuro* on June 15th, the mailing date of the notice of the coming stockholders' meeting. That notice stated (R. 22) as the purpose of the meeting, "to pass upon the question of the sale of the assets of the corporation to a partnership *to be formed* to take over the same." (Italics supplied.) As with the proposed transfer, so with the proposed formation of a partnership, the only thing which the minds of the parties were in agreement upon prior to the meeting date was the *advisability* of such action. Manifestly a partnership is not formed on agreement as to its advisability. And it would seem that the partnership was still *in futuro* on June 30th,, the date of the transfers. The resolution of the trustees taken that day states as follows (R. 63) :

Resolved that the Seattle-Renton Lumber Company sell to a partnership, which *will be composed* of the same persons who have held stock in the Seattle-Renton Lumber Company and which *will be known* as the Seattle-Renton Mill Company,
* * *. (Italics supplied.)

Since the bill of sale executed the day this resolution was passed runs now to "Seattle-Renton Mill Co., a partnership" (R. 73), and Roberts' declaration of trust in the real property also made that same day describes the beneficiaries named therein as "partners" (R. 78), seemingly formation of the partnership took place in the time interval between passage of the aforementioned resolution and the execution of the instruments of transfer. Yet it is acknowledged that only Weter, Roberts, and Carlson were present at the Weter and Roberts law office where the trustees' and stockholders' meetings were held, and it is not contended that anyone besides these three participated in any of the action there taken. It is therefore difficult to see how the partnership, *in futuro* when the resolution was passed, was a partnership *in esse* when the instruments were executed. Certainly the three participants at the meeting could not summarily establish a partnership, make co-partners of the eleven nonparticipants, and determine their respective partnership rights and obligations solely on the basis of the previous approval given to the pur-

pose of the proposed conversion of the business to partnership form. But we must accept this conclusion, we submit, if we are to give credence to taxpayer's contention that a partnership existed when the transfers were made.

The plain fact of the matter is that the so-called partnership was a mere sham; its formation nothing but a gesture. The "conversion" from corporation to partnership had no business purpose whatsoever; it was a tax-avoidance device pure and simple.. As taxpayer urges, there is nothing illegal or reprehensible in a taxpayer's endeavor legitimately to avoid or minimize his tax liability. *Superior Oil Co. vs. Mississippi*, 280 U. S. 390; *United States v. Isham*, 17 Wall. 496; *Jones v. Helvering*, 71 F. (2d) 214 (App. D.C.). The method used will be recognized if it is legally effected. See *Commissioner v. Falcon Co.*, 127 F. (2d) 277 (C.C.A. 5th); *Chisholm v. Commissioner*, 79 F. (2d) 14 (C.C.A. 2d). Cf. *Higgins v. Smith*, 308 U.S. 473; *Griffiths v. Commissioner*, 308 U.S. 355. Arrangements made without purpose other than minimization of tax liability are subject, however, to the most careful scrutinies, and they will be approved only when it is shown beyond any doubt that the purpose has in fact been legally accomplished. The material fact is what is actually done, and substance

governs over form. *Gregory v. Helvering*, 293 U.S. 465; *Thompson v. United States*, 110 F. (2d) 585 (C.C.A. 5th); *First Nat. Bank of Greeley, Colo. v. United States*, 86 F. (2d) 938 (C.C.A. 10th); *S. A. MacQueen Co. v. Commissioner*, 67 F. (2d) 857 (C.C.A. 3d), affirming 26 B.T.A. 1337; *United States v. Jelenko*, 23 F. (2d) 511 (Md.); *Jackson v. Commissioner*, 39 B.T.A. 937; *Mackay v. Commissioner*, 29 B.T.A. 1090; 2 Mertens, Law of Federal Income Taxation (1942), Section 17.06.

In the *Gregory* case, the Supreme Court, striking down a purported reorganization motivated solely to enable the taxpayer to escape taxation on the sale of certain stock,⁶ expressed the proposition thus (pp. 468-469) :

It is earnestly contended on behalf of the taxpayer that since every element required by the foregoing subdivision (B) is to be found in what was done, a statutory reorganization was effect-

⁶ The courts have similarly struck down "dummy" corporations erected for tax avoidance purposes; refused to recognize a transfer of assets by a corporation to an individual prior to an ultimate sale to a third person, when the transfer was motivated solely by desire to avoid taxation; denied that a taxpayer may avoid a tax upon income by assigning the right to receive it. See 2 Mertens, Law of Federal Income Taxation (1942), Sections 17.05, 17.06, 18.02, and cases therein cited.

ed, and that the motive of the taxpayer thereby to escape payment of a tax will not alter the result or make unlawful what the statute allows. It is quite true that *if a reorganization in reality was effected within the meaning of the subdivision (B)*, the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. [Citing authority.] But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended. (Italics supplied.)

So here, the question for determination is whether a partnership in reality was formed, and the assets of the business actually transferred.

To be sure, subsequent to the date of the transfers to the partnership which taxpayer claims was *then* in existence, certain action was taken in an effort to make it appear that the business had been converted from corporate to partnership organization. Thus, "books" were opened for the new partnership, but they were carried in the same binders as those of the corporation, and some of the accounts were apparently indexed together. (R. 111-112.) A bank account was opened for the "partnership," but it appears that an order of check forms which was erroneously printed with blanks for signature by president and

secretary was not returned for reprint, but was used. (R. 25.) Signs and stationery were changed by ink or stamp so that the word "Lumber" in the company title now read "Mill," but there was no indication whether the new name designated a corporation or partnership. (R. 25.) When inquiry was made by the mill customers as to why the name had been changed, they were told that the concern had become a partnership; but they were given neither the names of the co-partners nor any other details of the "conversion." (R. 25.) There was no published notice of the formation of a partnership, nor was any affirmative attempt made to give creditors and customers of the mill notice of the change. (R. 25.) No certificate of assumed business name was filed. (R. 25.) And all of the instruments of transfer were retained by Roberts; the deed to the real estate alone was placed of record, and that was done only after the Commissioner had raised the issue of the *bona fides* of this transfer and the existence of this partnership. (R. 24.)

There were no written articles of partnership (R. 25), and there is nothing in the evidence showing any oral understanding between the "co-partners" as to their respective rights and duties. Seemingly none of the "partners" contributed their services to

the business, except Carlson; and he "contributed" his services as manager at practically the same salary he had been receiving from the corporation. There were no contributions of capital except insofar as the stockholders may have left in the business their proportionate shares of the liquidating dividend. Cf. *Meehan v. Valentine*, 145 U.S. 611; *Earp v. Jones*, 131 F. (2d) 292 (C.C.A. 10th); *Commissioner v. Tenney*, 120 F. (2d) 421 (C.C.A. 1st); *Black v. Commissioner*, 39 B.T.A. 1068.

There does not appear to have been any agreement among the "partners" to share in the losses of the business, and under the evidence hereinbefore outlined, it may well be questioned, as the court below did (R. 32), whether any of the alleged partners except Weter, Roberts, Carlson, and possibly Shinstrom, could be held to partnership liability. However this may be, we are not dealing here with any doctrine of estoppel; again, for income tax purposes a partnership exists or does not exist. *Robertson v. Commissioner*, 20 B.T.A. 112; *Fouke v. Commissioner*, 2 B.T.A. 219. And see *Niles Fire Brick Co. v. Commissioner*, 6 B.T.A. 8 (involving a purported change from partnership to corporate form). See also 6 Mertens, Law of Federal Income Taxation (1942), Section 35.04.

We submit that there was no partnership in existence here. See *Covington v. Commissioner, supra*; *Hinz & Landt, Inc., of Los Angeles v. Commissioner*, 8 B.T.A. 375; *Rice-Sturtevant Automobile Co. v. Commissioner*, 6 B.T.A. 793; *Citizens Loan Association v. Commissioner*, 1 B.T.A. 518. Cf. *Royal Wet Wash Laundry v. Commissioner*, 14 B.T.A. 470.⁷ The evidence is clear that it was taxpayer corporation which operated this business during the last six months of 1933, in substance if not in form; and it was taxpayer corporation which was in reality the beneficial owner of the assets which produced the income here in question. It is the corporation, therefore, which is liable for the tax; the fruits may not be attributed to a different tree from that on which they grew. *Lucas v. Earl, supra*.

⁷ This case, upon which taxpayer places such reliance in its brief (pp. 31-33), is readily distinguishable from the one at bar. There, formal articles of partnership were executed on the date it was contend-ed that the partnership took over the business. A valid transfer of assets was made on that date; only the formal evidence of the transfer, the bill of sale, was lacking. Furthermore, the stockholders who were not present at the meeting where this business was transacted signed the minutes expressly approving the sale to the partnership.

CONCLUSION

For the reasons foregoing, we believe that the judgment of the District Court is entitled to affirmance.

Respectfully submitted,

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9

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

SEATTLE RENTON LUMBER COMPANY, a
corporation, *Appellant,*
vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF

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APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
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REPLY BRIEF

SUMMARY OF ARGUMENT

The objections raised by appellee to the manner in which appellant corporation transferred its business to a partnership are without substance, and even if they were well founded, would only render the transfers voidable at the instance of dissenting shareholders, of which there were none in this case, unanimous consent of the shareholders being clearly shown.

Appellee's second objection, that no partnership was formed to take over the business, is not supported either by the law or the facts, the record showing conclusively that a partnership was formed and oper-

ated the business the last six months of 1933. Appellee further argues that substance, not form, should determine tax liability, and yet, in this action where the record shows that in *substance*, the corporation transferred its business and the partnership operated it, appellee has raised only technical objections to the form by which the change was effected.

ARGUMENT

1. The objections raised by appellee to the manner in which appellant corporation transferred its business to a partnership are without substance, and even though they were well founded, would not render the transfer void, as has been alleged in appellee's brief, but only voidable at the instance of *dissenting* shareholders.

Appellee cites numerous cases and authorities to support its contention that a majority of the shareholders or directors of a corporation have no power to sell all the assets of a corporation without the unanimous consent of all the shareholders. The cases cited all involve transactions where a majority of the shareholders or directors sought to sell the assets of a corporation to some third person or to the majority shareholders themselves. In none of the cited cases was the question of a transfer of the assets to all of the shareholders as a partnership involved. In the cases cited, the rule is usually stated that a sale of all the assets of a corporation to a third person cannot be made against the dissent of a shareholder.

In *American Seating Co. v. Bullard* (C.C.A. 6) 290 Fed. 896, the court said that a sale of all the assets

of a corporation could not be made against the *dissent* of a shareholder. *Des Moines Life & Annuity Co. v. Midland Ins. Co.* (Minn.) 6 F.(2d) 228, also used the word "dissent" in stating the rule regarding the sale of all the assets of a corporation.

Turning to the Washington cases, we find that a corporation has inherent power to sell real or personal property, *Milton v. Crawford*, 118 Pac. 32, 65 Wash. 145, and the sale by it of all its assets is not *ultra vires*, but subject only to the restriction that the sale be not in fraud of the rights of shareholders. *Cardiff v. Johnson*, 218 Pac. 269, 222 Pac. 902, 126 Wash. 454.

The rule as to the power of a corporation to dispose of all its assets is stated in this latter case at page 461 of the Washington Report as follows:

"We should always adhere to the principle that the property of a going, solvent corporation could not be disposed of by a majority of the stockholders *over the protest of a single stockholder*, in order to get rid of the dissenting shareholder."

From the above cases it is apparent that the disposal of all the assets of a corporation is not *ultra vires* and clearly not against public policy.

The applicable public policy and the necessity for positive objection by a shareholder to set aside a transfer such as is involved in this case is stated in Fletcher's Cyclopedic of Corporations, Permanent Edition, Vol. 6, Page 1023, Ch. 36, Sec. 2943:

"That the state cannot raise objection to a transfer of all its property by a purely private, as distinguished from a quasi-public corporation seems to admit of no doubt. Thus, in an early

case in California, the court said: 'The only interest the public has in the continuance of the business is the remote, general interest, which it has in the proper development of the resources of the country. * * * If it is found from experience that the interests of the corporation and creditors require that the business should not be carried on upon so large a scale, or that it should cease entirely, and the disposal and conveyance of a part or the whole of the property is necessary to a reduction or cessation of business, and the stockholders consent, *or do not object*, we know of nothing in the statute, or in sound public policy, to prevent the sale or conveyance for such purpose. * * * The interests of business men, and of the public, must necessarily coincide, for the prosperity of the state is but the aggregate of the prosperity of its citizens.' "

In the case at bar, all of the beneficial owners of stock were consulted on the contemplated change from a corporation to a partnership to be made at the time the annual profit and loss statement was to be taken off (R. 53, 57), and all gave their approval to the plan. All were given notice of a special meeting for the express purpose of making a change from a corporation to a partnership (R. 58, 59), and yet not one shareholder ever made any sort of objection. Since there were no dissenters, of course the rule cited in appellee's brief is inapplicable.

The shareholders' meeting was, of course, regularly and lawfully held. The notice stated that the meeting was to be held at the mill office (R. 59). On the day of the meeting Mr. Roberts and Mr. Carlson spent the greater part of the day at the office putting

the books in shape for the contemplated transfer to the partnership (R. 60), and apparently no one else appeared or desired to attend the meeting. Mr. Roberts and Mr. Carlson owned over half of the shares and would, no doubt, have formed a quorum for the meeting. However, it appears that the meeting was adjourned (R. 65) to the law office of Weter, Roberts & Shefelman in order that Mr. Weter could participate in the meeting. The record shows that all interested parties were advised of the meeting and had an opportunity to attend. There is not the slightest suggestion that the change of the meeting place was made in order to conceal the actions of the participants, but on the contrary to enable a larger number of shares to be represented at the meeting. Of course, had the meeting been held at some secret place to the injury of shareholders who desired to participate, then those shareholders would have an opportunity to protest the validity of the meeting and, had they not ratified the acts of the officers, could bring an action for appropriate relief. However, such a rule has no application whatsoever to the facts in this case where no one suffered any injury, where everyone had an opportunity to attend, and where the expressed purpose of adjourning to another meeting place was to enable additional stock to be represented.

With appellee's contention that there was no consideration for the transfer of the corporate assets to a partnership, inconsistent theories are presented by its brief. Appellee first contends that the transfer was void because it was a sale without unanimous consent of the shareholders, and then argues that

there was no sale at all because the transaction was but a liquidating dividend. The argument presenting the question of consideration passing from corporation to partnership is indeed misleading, for questions of contract are not involved in the action. The issue here is whether the assets were transferred from the corporation to the partnership and whether the partnership thereafter operated the business. Of course no money actually changed hands, but the essence of the transaction was that the shareholder's interest in the corporation was exchanged for his interest in the partnership (R. 62 to 79).

Appellee also questions the validity of the assumption clause in the deed executed by the corporation, the theory of appellee's argument apparently being that the clause is too indefinite to be enforceable, and hence the transfer is without consideration. It is readily apparent that the transfer of the land and personal property was part of the same transaction, which was supported by valid consideration (R. 62-69).

2: In contending that no partnership was created at all in this case, the appellee, rather than consider the local law applicable to the question, states in its brief that, "the revenue law prescribes its own tests for the existence of a partnership; local law is not controlling." This statement is not borne out by the cases cited. The case of *Wholesalers Adjustment Co. v. Commissioner*, (C.C.A. 8) 88 F.(2d) 156, and *George Brothers & Co. v. Commissioner*, 41 B.T.A. 287, both involved not the creation of a partnership, but the

classification of a business organization for tax purposes. In both of the cases the question presented was whether a given organization was to be *classified* as an association subject to corporate taxes, or a partnership. The rule stated is that the question of *classification* for tax purposes depends upon the construction of the federal law. In other words, an organization might be, for some purposes, a partnership, and yet be taxed as an association.

We wish to point out here, however, that we are not considering how the particular organization should be classified, but rather, whether the organization has been in fact created. The question of whether a given organization has, in fact, been created, is a matter to be determined by local law. Thus, in *Chisholm v. Commissioner of Internal Revenue* (C.C.A. 2) 79 F.(2d) 14, where the issue was whether a partnership had been formed to sell certain assets and receive the proceeds therefrom, the court determined the question on the basis of the New York partnership law. In *Commissioner of Internal Revenue v. Tenney* (C.C.A. 1) 120 F.(2d) 421, at 423, the court held that no partnership had been created between a husband and wife because, under the applicable Massachusetts law, a married woman could not enter into a contract with her husband. In *The Niles Fire Brick Company*, 6 B.T.A. 8, the question of whether a partnership came into existence was determined on the basis of the law of the state in which the parties lived. In that case the business was inherited by the owners' children who thereafter continued to operate the business. The case holds that under the state law co-

owners who receive a business and continue to operate it automatically become a partnership.

We submit that a careful reading of the cases will show the existence of the Seattle Renton Mill Company partnership, for the purposes of this action, is to be determined by the laws of the State of Washington. The cases which have been cited in appellant's brief demonstrate that the existence of a partnership depends upon intention to create a partnership, which has been clearly shown in this case.

We should also like to call attention to the rationale found in *The Niles Fire Brick Co.*, 6 B.T.A. 8, case. It was there stated that where co-owners receive a business and continue to operate it, they automatically constitute a partnership. In the case at bar we find a valid transfer of all the assets of the corporation to the individual shareholders who thereafter continued to operate the business. On the basis of *The Niles Fire Brick Co.* case, they would automatically constitute a partnership whether or not they ever so intended or agreed.

However, all of the attending facts and circumstances show a settled intention on the part of the shareholders to create a partnership and operate the business after June 30, 1933. The matter, which was discussed and approved, was that the business be transferred from the corporation to a partnership on the 30th day of June, 1933 (R. 53-57). There was unanimous consent to that proposition and by reason of that consent the partnership came into existence. That the business was operated in the form of a partnership after June 30, 1933, can hardly be denied.

Appellee in its brief attempts to deny the existence of the partnership by reference to the tense of certain words in the notice of the shareholders meeting (R. 59) and the resolution of the Trustees (R. 63). The inference which appellee asks the court to draw from these papers is indeed weak. The appellee asks that the recital in the minutes that a sale be authorized to a partnership, "which will be composed" of certain shareholders and "which will be known" by a different name, and the recital in a notice to shareholders that a partnership is "to be formed" be taken to completely negative the demonstrated intention of the interested parties to form a partnership. If this inference is valid, then perhaps we should consider the language of the corporate minutes which read: "* * * and the offer of the said partnership to purchase * * * be accepted * * *" (R. 62), or of the Declaration of Trust (R. 76 at 78), which reads: "I further declare that I have taken said title at the request of the persons interested in the said estate, *who are partners as the Seattle Renton Mill Co.* * * *, or comparable language in the minutes of this shareholders meeting (R. 68) or of the bill of sale (R. 73).

What is perhaps most convincing in determining what the parties intended is the completeness with which the operation was carried on as a partnership. Immediately after June 30, 1933, the names on the signs, stationery, invoices, truck and the like were changed to show the new form of organization (R. 98, 102, 148, 150, 157, 158-161, 117-123). New signature cards were made out (R. 95) and those who asked were advised that a partnership had been

formed (R. 151-152). New books were opened for the partnership (R. 112) and the record shows no action whatsoever by the corporation after June 30, 1933, with respect to the mill operation. It is difficult to understand what else might have been done to more clearly show to the world that the mill business was from June 30, 1933, to be carried on as a partnership. These acts clearly show that the interested parties all intended to be a partnership. They took such steps as they believed were necessary to create a partnership and we submit that all the shareholders, by reason of their assent to the acts done, bound themselves as partners, not by estoppel but by a contract of partnership.

Appellee states the rule in its brief that, for the purposes of taxation, the substance rather than the form of a transaction should determine the question of tax liability. Applying that rule to the case at bar, it clearly appears that, in substance as well as form, the business was carried on by a partnership after June 30, 1933, and we submit that all the objections raised by appellee in this case are matters of form, rather than substance, as for example the technical questions as to the validity of the corporate meetings, corporate notices, and the corporate conveyances.

3. Appellee, on page 17 of its brief, alleges that the partnership had no business purpose and that, since its only purpose was to avoid taxation, the appellant would have to show that it had legally effected the change "beyond any doubt" before the transaction would be recognized for purposes of taxation. Neither

of these assertions is true. The partnership did have an avowed business purpose and that business purpose was to operate the mill. An example of what is meant by an organization being created with no business purpose is found in the case of *Gregory v. Helvering*, 293 U.S. 465, 79 L. ed. 596, 55 S.Ct. 266. In that case the Averill corporation was organized merely to receive a transfer of assets and then dissolve. Its corporate existence continued one day. The court pointed out in that case that the corporation had no business purpose because *it was never intended to operate or function as a business organization*. However, in the case at bar, it cannot be contended that the intention of the parties involved in this case was other than that the partnership should operate the business.

There is no rule which requires that appellant show the change asserted in this case "beyond any doubt" before it can relieve itself of tax liability. The cases cited by appellee in support of that allegation merely held that, where the assets of a corporation are transferred to an individual prior to an ultimate sale to a third person who is actually intended to be the purchaser rather than the intermediate transferee, and where such a transaction is obviously intended to avoid taxation on capital gains, the transaction will be scrutinized with care and must be shown to have been legally accomplished beyond a doubt. The authorities cited by appellee and the holdings of those cases are as follows:

Gregory v. Helvering, 293 U.S. 465, 79 L. ed. 596, 55 S.Ct. 266. In this case, in order to receive assets of a corporation and thus avoid realization of income to

it, the sole stockholder effected a "reorganization" by which the Averill Corporation was organized, received the assets on the purported reorganization and then dissolved, distributing its assets to the sole stockholder. The court held that this was not a reorganization, even though all the legal steps had been taken.

S. A. MacQueen Co. v. Commissioner (C.C.A. 3) 67 F.(2d) 857. Here, the corporation "sold" its assets to a shareholder at an arbitrary figure and he in turn sold them for a great profit, accounting therefor to the other shareholders. In this case the court said the capital gain was that of the corporation.

First National Bank of Greeley v. U. S. (C.C.A. 10) 86 F.(2d) 938; *Mackay v. Commissioner*, 29 B.T. A. 1090; *Jackson v. Commissioner of Internal Revenue*, 39 B.T.A. 937, are also cases involving a dummy purchaser used to reduce realization of income on sale or exchange of assets. The rule of these cases is stated in 2 Mertens, Law of Federal Income Taxation (1942) Sec. 17.06:

"Many of the cases involving a transfer of assets by a corporation to an individual prior to an ultimate sale to a third person show a desire to avoid taxation. However, in the absence of fraud, such device, if effected by legal means, must be recognized, for the proper avoidance or diminution of a foreseen tax liability is not prohibited. Nevertheless, *such arrangements* are not looked upon with favor and must be carefully scrutinized, and will be approved only when their facts show beyond any doubt the purposes thereof have been legally accomplished."

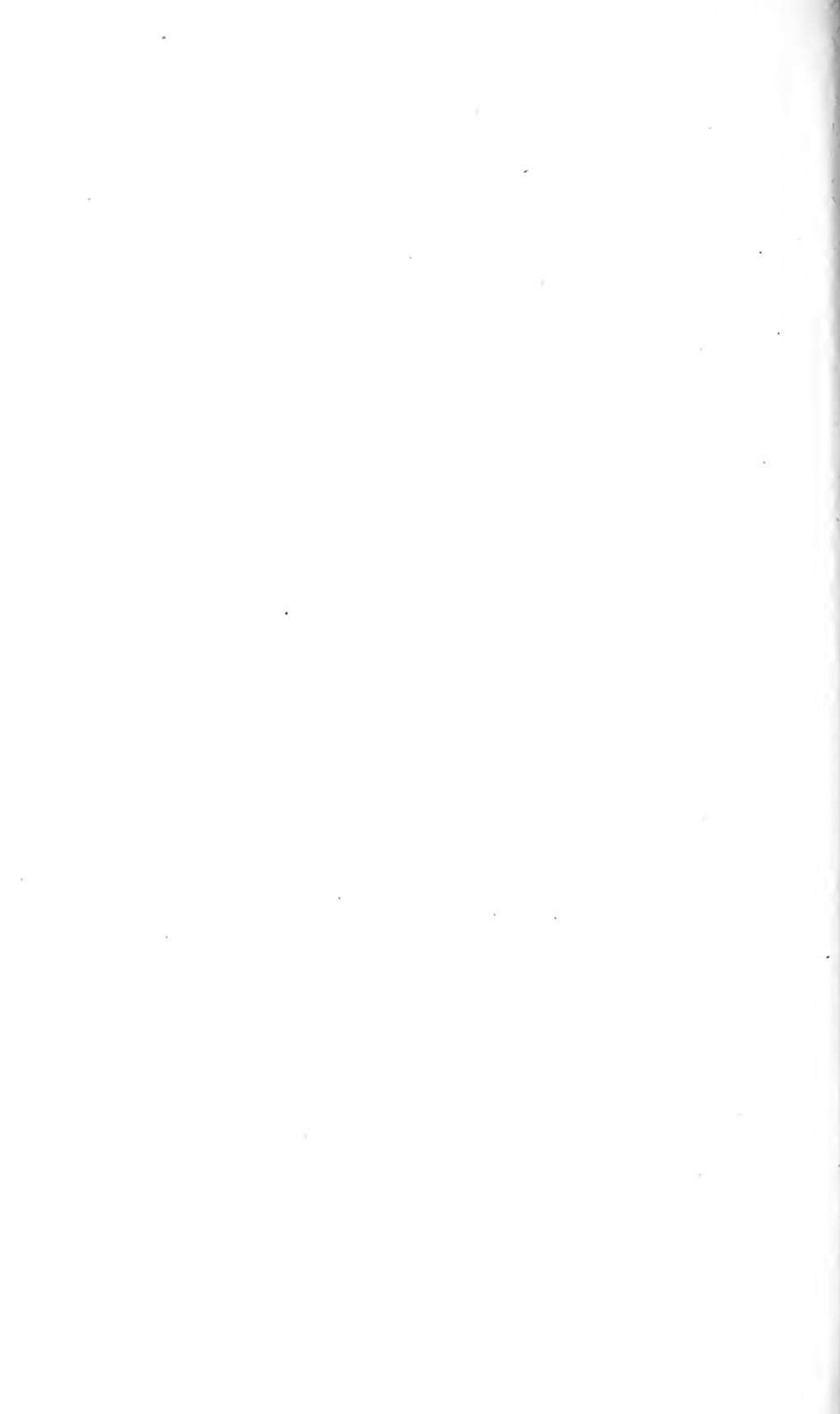
Since the transfer of the business from the ap-

pellant corporation to the partnership in this case was for the purpose of enabling the partnership to operate the business, and thus reduce income taxation, and not to constitute the partnership a dummy for a pre-conceived sale to third persons in order to avoid taxes on capital gains, the authorities cited are clearly not in point and we have found no cases which require that appellant prove its case "beyond any doubt" rather than that it merely establish its case by a preponderance of the evidence.

We submit that the evidence shows a settled intention, understanding and agreement by the owners that the business be carried on as a partnership; that each shareholder contributed to the partnership to the extent of his interest in the business and that in law and fact all of the former shareholders of the Seattle Renton Lumber Company became partners doing business as the Seattle Renton Mill Company. We further submit that the uncontroverted evidence shows clearly that appellant corporation received no income after June 30, 1933, and that the judgment of the District Court should be reversed.

Respectfully submitted,

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United States
Circuit Court of Appeals
For the Ninth Circuit.

R. E. LEE and STANDARD ACCIDENT AND
INSURANCE COMPANY, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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- direct 119
—cross 137
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- direct 114
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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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United States District Attorney,

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Assistant United States District Attorney,
Butte, Montana.

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MR. JOHN E. CORETTE,

MR. JOHN E. CORETTE, JR.,

MR. ROBERT D. CORRETTE,

MR. WILLIAM A. DAVENPORT,

MR. KENDRICK SMITH,

Butte, Montana.

Attorneys for Defendants and appellants.

[1*]

*Page numbering appearing at foot of page of original certified
Transcript of Record.

In the District Court of the United States
District of Montana
Great Falls Division

No. 150

UNITED STATES OF AMERICA,
Plaintiff,

vs.

R. E. LEE and STANDARD ACCIDENT
INSURANCE COMPANY, a Corporation,
Defendants.

COMPLAINT

Comes now the plaintiff above named, United States of America, by and through John B. Tansil, duly appointed, qualified and acting Attorney of the United States, in and for the District of Montana, at the direction of the Attorney General of the United States, and at the request of the Secretary of the Interior of the United States, in the name of the United States, in its own behalf and for the use and benefit and in behalf of the Blackfeet Tribe of Indians, wards of the said plaintiff, and for cause of action against the defendants complains and alleges as follows, to-wit:

I.

That this Court has jurisdiction hereof by reason of the provisions of Section 41 of Title 28, U. S. Code.

II.

That at all of the times mentioned herein the plaintiff was, is and continues to be the owner in fee simple of the following described real property, situated, located and being upon and within the Blackfeet Indian Reservation, in the County of Glacier, in the State and District of Montana, to-wit:

E/2 E/2 E/2 W/2 NE/4, E/2 SE/4, Section 27, T. 33, N., R. 6 W., M. P. M.

SW/4, W/2 NW/4 NE/4, SE/4, Section 26, T. 33 N., R. 6 W., M. P. M.;

W/2 W/2 SW/4, Section 25, T. 33 N., R. 6 W., M. P. M., containing 470 acres

together with all of the oils and minerals contained beneath the [3] surface of said property, said land, oils and minerals, however, being held by the United States for the use and benefit of the Blackfeet Tribe of Indians, its ward, and its Indian wards residing upon the said Blackfeet Indian Reservation and members of said Tribe.

III.

That at all of the times herein mentioned the defendant, Standard Accident Insurance Company, a Corporation, was, continued to be and now is a corporation duly and regularly organized and existing, and as such authorized and empowered to be, act and become a surety.

IV.

That on or about the 26th day of September, 1935, the Blackfeet Tribe of Indians, acting by and through the Superintendent and Special Disbursing Agent of said Tribe, and the defendant, R. E. Lee, entered into a certain agreement and lease, in writing, a copy of which said lease and agreement is hereto attached, marked Exhibit "A", and hereof made a part as fully and completely as though here set out in haec verba, and that the said lease so made as aforesaid was duly and regularly approved by the Secretary of the Interior on the 24th day of January, 1936.

V.

That the said lease provided, among other things, as follows:

"And before this lease shall become effective the lessee shall furnish a satisfactory bond as required by the regulations."

VI.

That thereupon and in compliance with the regulations and in order that the said lease become effective, the said R. E. Lee, as principal, and the said Standard Accident Insurance Company, a corporation, as surety, duly and regularly, on the 10th day of December, 1935, made, executed and delivered to the plaintiff its certain instrument in writing and bond, a full, true [4] and correct copy

of which is hereto attached, marked Exhibit "B", and hereof made a part as fully and completely as though here set out in haec verba.

VII.

That the said bond was approved on the 24th day of January, 1936, by the Secretary of the Interior, and thereupon the said lease became and was effective and continued in full force and effect until the same was cancelled, as hereinafter set out and that the said bond became effective upon its approval on January 24, 1936, and during all the times herein mentioned was, continued to be and now is in full force and effect.

VIII.

That the said lease, Exhibit "A", provided in part as follows:

"(4) The lessee agrees to begin drilling operations on the land covered by this lease within ninety (90) days from date of the approval hereof by the Secretary of the Interior, and to drill at least (Four) wells on the premises within one year from the date of such approval * * *. If the lessee shall fail to drill any or all of the wells as herein provided, such failure shall be a violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease, but such cancellation shall not in any way serve to release or relieve

the lessee or surety from the covenants and obligations to pay any accrued obligation."

IX.

That thereafter and after the said lease became in full force and effect, the defendant, R. E. Lee, entered into and upon the above described real estate and premises and took possession thereof and commenced drilling operations thereon, but that the said lessee did not drill four wells upon the said premises within one year from the date of the approval of the said lease, or at all, as he had promised and agreed to do, and wrongfully failed, refused and neglected to drill the said four wells upon the said leased premises, or any part thereof, within one year from the date of the approval of the said lease, or at all, as he had promised and agreed to do. [5]

X.

That it was further provided in said lease in part as follows:

"(10) In the event of failure or neglect of the lessee to perform any obligations under this lease, the Secretary of the Interior shall have the right, at any time after thirty days' notice to the lessee specifying the terms and conditions violated, to cancel this lease."

XI.

That on the 9th day of July, 1937, the said defendant, R. E. Lee, then being in default in said

lease and not having drilled four wells upon the leased premises, or any part thereof, within one year from the date of approval of the lease, or at all, as he had promised and agreed to do, the Secretary of the Interior, on said 9th day of July, 1937, gave to the said R. E. Lee a notice in writing as provided in said lease, a copy of which said notice is hereto attached, marked Exhibit "C", and hereof made a part as fully and completely as though here set out in haec verba.

XII.

That the said R. E. Lee failed, refused and neglected to show cause, as required by said notice, within thirty days, or at all, why the said lease should not be cancelled and the said R. E. Lee still being in default as aforesaid, under the terms and conditions of the said lease, and having breached the same, the Secretary of the Interior did, on the 20th day of January, 1938, duly and regularly cancel the said lease, and declared the said bond, Exhibit "B", forfeited.

XIII.

That it was provided in part in said lease, as follows:

"(4) * * * It is further understood and agreed that if the said lessee shall fail or refuse to drill as provided herein, or fail to obtain an extension of the time within which to drill he shall pay to the officer in charge, for

the benefit of the Blackfeet Tribe of Indians, the full amount for which this lease is bonded.” [6]

XIV.

That the defendant, R. E. Lee, did not obtain any extension of time within which to drill or to perform the drilling operations required of him to be performed under said lease.

XV.

That thereafter and on the 3rd day of February, 1938, a demand was made upon the defendants for the payment of the sum of \$6,000.00, the amount specified as the amount of said bond, within thirty days from the said 3rd day of February, 1938, but that the said defendants failed, refused and neglected to pay the said sum of \$6,000.00, or any part or portion thereof, within thirty days from February 3, 1938, or at all, and there is now due, owing and wholly unpaid from the defendants to this plaintiff the said sum of \$6,000.00, with interest thereon at the rate of 6% per annum from the 3rd day of February, 1938.

XVI.

That the plaintiff herein duly and regularly performed all the conditions precedent on its part to be performed under said lease and said agreement.

Wherefore, plaintiff prays judgment against the defendants and each of them for the sum of \$6,000.00, together with interest thereon at the rate

of 6% per annum from the 3rd day of February, 1938, and for the plaintiff's costs of suit herein necessarily expended.

R. LEWIS BROWN,

Assistant Attorney of the
United States, in and for
the District of Montana.

[Endorsed]: Filed Dec. 18, 1939. [7]

EXHIBIT "A"

5-157 OIL & GAS LEASE NO. 129

Oil and Gas Mining Lease Tribal Indian Lands

This Lease made and entered into, in triplicate on this 26th day of September, A. D. 1935, by and between Warren L. O'Hara, Sup't & S.D.A., acting for and in behalf of the Blackfeet Tribe of Indians, in accordance with the resolution dated July 10, 1935, of the Blackfeet Tribal Council, party of the first part, designated as lessor, and R. E. Lee of Cut Bank, Montana, party of the second part, designated as lessee, under and in pursuance of Section 3 of the Act approved February 28, 1891 (26 Stat. L., 795), as amended by the Act approved May 29, 1924 (Public No. 158, 68th Congress), Witnesseth:

1. The lessor, in consideration of one dollar, the receipt whereof is acknowledged, and of the royal-

ties, covenants, stipulations, and conditions herein contained, and hereby agreed to be paid, observed, and performed by the lessee, does hereby demise, grant, lease, and let unto the lessee, for five years from the date of approval hereof, and as long thereafter as oil or gas is found in paying quantities, all the oil and gas deposits in or under the lands described as follows, to-wit:

E/2 E/2 E/2 W/2 NE/4, E/2 SE/4, Sec. 27,
T. 33 N., R. 6 W., M. P. M.
SW/4, W/2 NW/4 NE/4, SE/4, Sec. 26, T.
33 N., R. 6 W., M. P. M.
W/2 W/2 SW/4, Sec. 25, T. 33 N., R. 6 W.,
M. P. M.

containing 470 acres.

2. The lessee hereby agrees to pay or cause to be paid to the officer of the United States having jurisdiction over the leased premises, hereinafter called the officer in charge, for the use and benefit of the lessor, as royalty, 12½ per cent of the gross proceeds of all crude oil extracted from the said lands unless the lessor, with the approval of the Secretary of the Interior, shall elect to take the royalty in oil, such payment to be made at the time of sale or removal of the oil.

Should the lessor, with the approval of the Secretary of the Interior, elect to take the royalty in oil, the lessee shall furnish free storage for the royalty oil for not exceeding thirty days.

In time of war or other public emergency any of the executive departments of the United States Government shall have the option to purchase at the highest posted market price on the date of sale all or any part of the oil produced under this lease.

The royalty on gas, whether it shall be gas from which the casing-head gasoline has been extracted or otherwise, shall be 12½ per cent of the value thereof in the field where produced when the average daily production for the calendar month from the land leased is less than [8] 3,000,000 cubic feet, and 16 2/3 per cent of the value thereof when the average daily production for the calendar month is 3,000,000 cubic feet or more: Provided, That where wells produce both oil and gas or oil and gas and water to such an extent that the gas is unfit for ordinary domestic purposes, but is used temporarily in connection with drilling and pumping operations on adjacent or near-by tracts, the lessee shall pay royalty at the rate of 12½ per cent of the gross proceeds of the sale of gas from such wells. Failure on the part of the lessee to use a gas producing well which can not profitably be utilized at the rate herein named shall not work a forfeiture of this lease so far as it relates to mining oil, but if the lessee desires to retain gas-producing privileges he shall pay a rental of \$100 per annum in advance, calculated from the date of the discovery of gas on each gas-producing well, the gas from which is not marketed nor utilized other than for operations under this lease.

On casing-head gas used or sold for the manufacture of casing-head gasoline, the rate of royalty shall be 12½ per cent of the value of the casing-head gas, which value shall be determined and computed on the basis and in the manner provided in the regulations governing the utilization of casing-head gas produced from oil wells on restricted Indian lands. In cases where gas produced and sold has a value for drip gasoline, casing-head gasoline content, and as dry gas from which the casing-head gasoline has been extracted, then the royalties above provided shall be paid on all such values. The lessor shall have the right to the use of gas delivered at the well or at the nearest trunk line for any desired school or other building belonging to the tribe, but the lessee shall not be required to pay royalty on gas so used. Payments of annual gas royalties shall be made within 25 days from the date such royalties become due, other royalty payments to be made monthly on or before the 25th day of the month succeeding that for which such payment is to be made, supported by sworn statements.

(3) Until a producing well is completed on said premises, the lessee shall pay, or cause to be paid, to the Superintendent of the Blackfeet Agency, for the use and benefit of the lessor, as advance rentals one dollar per acre per annum from the date of approval of this lease. It is understood and agreed that such sum of money so paid shall be a credit on stipulated royalties for the year for

which the payment of advance rentals is made, and the lessee hereby agrees that said advance rentals when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation hereof; nor shall the lessee be relieved from the obligation to pay said advance rental annually, when it becomes due, by reason of any subsequent surrender or cancellation of this lease.

(4) The lessee agrees to begin drilling operations on the land covered by this lease within ninety (90) days from the date of approval hereof by the Secretary of the Interior and to drill at least (Four) wells on the premises within one year from date of such approval; and to drill four wells during each successive year thereafter until as many wells have been drilled as there are forty acre tracts or fractional parts thereof included in the lease; and thereafter to diligently drill such additional wells as may be necessary and proper in the judgment of the Secretary of the Interior to fully develop the land and extract the oil and gas therefrom in accordance with the most approved methods of drilling development in the field where the lands are located. It is further understood and agreed that the completion of a well is to be considered a minimum depth of one hundred (100) feet into the Madison limestone, unless production in paying quantities is found at a lesser depth. If the [9] lessee shall fail to drill any or all of the wells as herein provided, such failure shall be a

violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease, but such cancellation shall not in any way serve to release or relieve the lessee or surety from the covenants and obligations to pay any accrued obligation; Provided, That the Secretary of the Interior may, in his discretion, upon application of the lessee, extend the time within which any well shall be commenced upon the payment of annual rental of one dollar per acre, for each whole year the beginning of such well is delayed. For the guidance of the Secretary of the Interior, the Blackfeet Tribal Business Council will be consulted as to its opinion in this matter. It is further understood and agreed that if the lessee shall fail or refuse to drill as provided herein, or fail to obtain an extension of the time within which to drill he shall pay to the officer in charge, for the benefit of the Blackfeet Tribe of Indians, the full amount for which this lease is bonded.

The lessee further agrees to drill and produce all wells necessary to offset or protect the leased land from drainage by wells on adjoining lands not the property of the lessor, or in lieu thereof to compensate the lessor for the estimated loss of royalty through drainage. During the period of supervision by the Secretary of the Interior the necessity for offset wells shall be determined by the officer in charge and payment in lieu of drilling and producing shall be in an amount determined

by the officer in charge subject to the right of appeal to the Secretary of the Interior and paid as provided in section 2 of this lease.

S/ R. E. LEE,
Lessee.

Subscribed and sworn to before me this 12th day of November, 1935.

[Notarial Seal]

L. B. MERRILL,
Notary Public

It is agreed that the above be made a material and binding part of oil and gas lease No. 129.

STANDARD ACCIDENT IN-
SURANCE CO.,

By L. B. TEPLING,
Its Attorney-in-Fact

[Corporation Seal] Surety.

By ALBERT D. DAY,
Its Attorney-in-Fact

5. The lessee shall carry on development and operations in a workmanlike manner, commit no waste on the said land, and suffer none to be committed upon the portion in his occupancy or use, take good care of the same, and promptly surrender and return the premises upon the termination of this lease to lessor or to whomsoever shall be lawfully entitled thereto, unavoidable casualties excepted; shall not remove any casings in producing wells, or, without the written consent of the

lessor, remove therefrom any buildings or permanent improvements erected thereon during the said term by the said lessee, excepting tools, derricks, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, and machinery, and the casing of all dry or exhausted wells which shall remain the property of the lessee and may be removed at any time prior to sixty days after the termination of the lease by forfeiture or otherwise; and shall not permit any nuisance to be maintained on the premises under lessee's control, nor allow any intoxicating liquors to be sold or given away [10] for any purposes on such premises; shall not use such premises for any other purposes than those authorized in the lease, and before abandoning any well shall securely plug the same so as effectually to shut off all water from the oil or gas bearing strata. Failure to so plug a well as to effectually shut off the water from the oil or gas strata shall be a violation of one of the material and substantial terms and conditions of this lease. The lessee agrees that if a nonproducing oil and gas well develops usable water it may be turned over to the reservation without plugging and on such terms as may be agreed upon by the contracting parties, it being, however, definitely understood that the lessor shall in no case be required to pay more than the actual market value of whatever casing is left in the well in order to secure the same for the reservation.

6. The lessee shall keep an accurate account of

all oil mining operations showing the sales, prices, dates, purchases, and the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and all other personal chattels used in operating said property, and also upon all of the unsold oil obtained from the land herein leased, as security for payment of said royalty.

7. The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of one dollar and have this lease canceled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder: Provided, That if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office.

8. This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental *or* acreage, unless agreed to by both parties.

9. The lessee hereby agrees that he will not assign or sublet any part of the lands herein leased without the written consent of the Secretary of the

Interior being first obtained. The assignment of this lease or any interest therein without such written consent shall constitute a violation of one of the material and substantial terms and conditions of this lease and be cause for cancellation thereof.

10. In the event of failure or neglect of the lessee to perform any obligations under this lease, the Secretary of the Interior shall have the right, at any time after thirty days' notice to the lessee specifying the terms and conditions violated, to cancel this lease.

11. The lessee agrees that he will keep all highways on the reservation used by him in as good state of repair as he finds the same.

12. This lease is made and accepted subject to existing law and any laws hereafter enacted by Congress as to the said lands, also to the regulations relative to such leases heretofore or hereafter prescribed by the Secretary of the Interior, and in no event shall the United States or the Secretary of the Interior be liable for damages or otherwise under the provisions hereof, and before this lease shall become effective the lessee shall furnish a satisfactory bond as required by the regulations. The obligations and agreements hereinbefore expressed shall extend to and be binding upon the successors in interest of the parties hereto. [11]

In Witness Whereof, the said parties have here-

unto subscribed their names and affixed their seals
on the day and year first above mentioned.

WARREN L. O'HARA,

Special Disbursing Agent

By H. M. KNUTSON,

Deputy Disbursing Agent.

[Seal]

R. E. LEE

Two Witness to Lessee

JAMES H. McCOURT

W. L. EWING

ACKNOWLEDGEMENT OF INDIVIDUAL

State of Montana,

County of Glacier—ss.

Before me, a notary public in and for said county and State, on this 12th day of November, 1935, personally appeared R. E. Lee, to me known to be the identical person who executed the within and foregoing lease, and acknowledged to me that he executed the same of his free and voluntary act and deed for the uses and purposes therein set forth.

[Notarial Seal]

L. B. MERRILL,

Notary Public, Residing at
Cut Bank, Montana.

My commission expires March 22, 1936.

Department of the Interior,
United States Indian
Service,
Blackfeet Agency,
Browning, Montana

December 12, 1935.

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be approved. See my report of even date.

WARREN L. O'HARA,
Special Disbursing Agent.
By H. M. KNUTSON,
Deputy Disbursing Agent.

[12]

Office of Indian Affairs,

Washington, D. C., Jan. 3, 1936

Respectfully submitted to the Secretary of the Interior with recommendation that it be approved.

T. E. MURPHY,
For the Commissioner.

Washington, D. C., Jan. 24, 1936

The within lease is Approved.

T. A. WALTERS,
First Assistant Secretary of
the Interior. [13]

Department of the Interior
Office of the Secretary
Washington, D. C.

Jan. 20, 1938

Lease Cancelled, and lessee and his surety held for the full amount of the bond given in connection with the lease, and for the proper conditioning of the leased premises.

OSCAR L. CHAPMAN
Assistant Secretary. [14]

EXHIBIT "B"

5-157c

To Accompany Mining Leases of Tribal Lands

BOND

Know All Men By These Presents, That R. E. Lee, of Cut Bank, Montana, as principal, and Standard Accident Insurance Company, a corporation, of Detroit, Michigan, as surety, are held and firmly bound unto the United States of America in the sum of Six Thousand dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, successors, executors, administrators, or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of December, 1935.

The Condition Of This Obligation Is Such, that whereas the above-bounden R. E. Lee, as principal, entered into a certain indenture of lease, dated September 26, 1935, with the officer in charge of the Blackfeet Tribe of Indians for the lease of a tract of land described as follows:

E/2 E/2 E/2 W/2 NE/4, E/2 SE/4 of Section 27, Twp. 33N., Rge. 6W.;

SW/4, W/2 NW/4 NE/4, SE/4 of Section 26, Twp. 33N., Rge. 6W.;

W/2 W/2 SW/4 of Section 25, Twp. 33N., Rge. 6W., containing 470 acres,

and located in Blackfeet Reservation, for oil and gas drilling purposes for the period of Five (5) years, from the date of approval hereof, and as long thereafter as oil or gas is found in paying quantities.

Now, if the above-bounden R. E. Lee shall faithfully carry out and observe all the obligations assumed in said indenture of lease by him and shall observe all the laws of the United States, and regulations made, or which shall be made thereunder, for the government of trade and intercourse with Indian tribes, and all the rules and regulations that have been or may be, lawfully prescribed by the Secretary of the Interior relative to leases [15] executed on the Blackfeet Reservation, in the State of Montana, then this obligation shall be null and void; otherwise to remain in full force and effect.

Signed and sealed in the presence of——
(Sgd.) R. E. LEE

Witnesses:¹

JAMES H. McCANRT

P. O. Cut Bank, Mont.

W. L. EWING

P. O. Cut Bank, Mont.

as to [Seal] R. E. LEE

GRACE HURIN

P. O. Helena, Montana

ELIZABETH WARDLAW

P. O. Helena, Montana

as to [Seal] STANDARD ACCIDENT INSURANCE CO.

By L. B. TEPLING

Its Attorney-in-Fact

By ALBERT D. DAY

Its Attorney-in-Fact

DEPARTMENT OF THE INTERIOR

Washington

This bond terminated only
as to liabilities accruing
after

Assistant Secretary

¹Two witnesses to all signatures.

Department of the Interior

Washington, D. C. Jan. 24, 1936.

Approved:

T. A. WALTERS

First Assistant Secretary.

Sig. [16]

EXHIBIT "C"

L-C&G

12831-37

HFL

Jul. 9, '37

Mr. R. E. Lee

Cut Bank, Montana.

Dear Sir:

Consideration has been given here to your application for the cancellation of Blackfeet tribal oil and gas mining lease No. 129 and termination of liability under a bond given in connection with the lease. The lease covers two separate tracts described as follows:

Tract No. 1, the E $\frac{1}{2}$ E $\frac{1}{2}$ E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 27; E $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 27, SW $\frac{1}{4}$ Section 26, all in Twp. 33 N., R. 6 W., in Montana, containing 250 acres.

Tract No. 2, W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ of Section 26; W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 25, all

in Twp. 33 N., R. 6 W., in Montana, containing 220 acres.

The lands involved were sold at the lease sale held September 25, 1935. The following is quoted from the notice of sale: "Each of the above described tracts will be offered for sale separately but any bidder purchasing a lease on two or more tracts may include the same in one lease, the drilling obligations being carried with each tract as advertised."

The drilling obligations in Section 4 of the lease involved require commencement of drilling operations within ninety days and the drilling of four wells within one year from date of approval of the lease. The lease also provides that if the lessee shall fail or refuse to drill the required number of wells or fail to obtain an extension of time within which to drill, he shall pay for the benefit of the lessor or lessors the full amount for which the lease is bonded.

Only one well has been drilled on tribal lease No. 129. The application for cancellation of lease No. 129 is dated December 4, 1936, and was received at the Agency on December 21, 1936.

In view of the foregoing you will be allowed thirty days from date of this letter within which to show cause to the Superintendent of the Blackfeet Indian Agency why the lease should not be cancelled and you be required to pay to the Superintendent for the benefit of the Blackfeet Tribe the

sum of six thousand dollars as provided in Section 4 of the lease for failure to comply with the drilling provisions contained in said Section 4. [17]

A copy of this letter is being forwarded to the surety on the lease.

Sincerely yours,

(Signed) WILLIAM ZIMMERMAN

Assistant Commissioner

WWL-7/1

Carbon to Standard Accident Insurance Company, Detroit, Michigan. [18]

[Title of District Court and Cause.]

ANSWER

Comes Now R. E. Lee and Standard Accident Insurance Company, the Defendants in the above entitled cause, and for their Answer to the Complaint of Plaintiff on file herein admit, deny and allege as follows:

FIRST DEFENSE

1. The Complaint fails to state a claim against Defendants, or either of them, upon which relief can be granted.

SECOND DEFENSE

1. Defendants admit the allegations contained in Paragraphs I, II, III, IV, V, VI, VIII, X, XIII and XIV.

2. In answering Paragraph VII of the Plaintiff's Complaint, these Defendants admit that the said Bond and the said Lease were approved on the 24th day of January 1936, by the Secretary of the Interior and that, thereupon, the said Lease became and was effective. These Defendants, and each of them, deny each and every allegation contained in [31] Paragraph VII of Plaintiff's Complaint, not hereinbefore specifically admitted.

3. In answer to Paragraph IX of Plaintiff's Complaint, these Defendants admit that after the said Lease became in full force and effect, the Defendant, R. E. Lee, entered into and took possession of the real estate described in the Complaint and commenced drilling operations thereon and that the said R. E. Lee, Lessee, did not drill four (4) wells upon said premises within one (1) year from the date of the approval of said Lease, or at all. These Defendants, and each of them, deny each and every allegation contained in Paragraph IX of Plaintiff's Complaint not hereinbefore specifically admitted. In this connection these Defendants, and each of them, allege that the said R. E. Lee did, within one (1) year from the date of the approval of said Lease, drill one (1) well on the premises described in Plaintiff's Complaint and covered by said Lease.

4. In answer to Paragraph XI of Plaintiff's complaint, the Defendants admit that the Secretary of the Interior, on or about July 9th, 1937, sent to the Defendant, R. E. Lee, a notice, in writing,

a copy of which is attached to Plaintiff's Complaint and marked Exhibit "C". These Defendants, and each of them, deny each and every allegation contained in Paragraph XI of Plaintiff's Complaint not hereinbefore specifically admitted.

5. In answer to Paragraph XV of Plaintiff's Complaint, the Defendants admit that on or about February 3rd, 1938, a demand was sent to an Attorney for Defendant, R. E. Lee, notifying him that said R. E. Lee had been allowed thirty (30) days within which to pay the sum of \$6,000.00, which is [32] the amount specified in the bond specifically described in Plaintiff's Complaint, and that the Defendant, R. E. Lee, refused to pay the said sum of \$6,000.00, or any part or portion thereof. The defendants and each of them deny each and every allegation contained in Paragraph XV of Plaintiff's Complaint not hereinbefore specifically admitted.

6. These Defendants deny each and every allegation contained in Paragraphs XII and XVI of Plaintiff's Complaint.

7. These Defendants, and each of them, deny each and every allegation contained in Plaintiff's Complaint not hereinbefore specifically admitted or denied.

THIRD DEFENSE

These Defendants, as a first affirmative defense to the Complaint of Plaintiff on file in the above entitled cause allege as follows:

1. That on or about the 26th day of September, 1935, that Certain Oil & Gas Mining Lease, a copy of which is marked Exhibit "A", attached to Plaintiff's Complaint, and is hereby referred to and incorporated as a part of this First Affirmative Defense, the same as if fully set out in this First Affirmative Defense, was made and entered into by and between the Blackfeet Tribe of Indians, acting through the Superintendent and Special Disbursing Agent of said Tribe, and the Defendant, R. E. Lee, and that said Lease, so made as aforesaid, was duly and regularly approved by the Secretary of the Interior on the 24th day of January, 1936.

2. That said Oil & Gas Mining Lease provided that the Lessee should furnish a satisfactory bond, as required by the regulations and in compliance with said Lease and with the regulations, the said Defendant, R. E. Lee, as principal, and the said Defendant, Standard Accident Insurance Company, [33] a corporation, as surety, duly and regularly on the 10th day of December, 1935, made, executed and delivered to the Plaintiff that certain Bond, a full, true and correct copy of which is marked Exhibit "B", attached to Plaintiff's Complaint, and is hereby referred to and incorporated herein by reference as fully and completely as though set out herein.

3. That said Bond was approved on the 24th day of January, 1936, by the Secretary of the In-

terior, and that said Oil & Gas Mining Lease was approved on said 24th day of January, 1936, by said Secretary of the Interior, and said Oil & Gas Mining Lease thereupon became effective.

4. That said Lease, which is marked Exhibit "A", attached to Plaintiff's Complaint and incorporated by reference as a part of this First Affirmative Defense, provided in part as follows:

"7. The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of one dollar and have this lease canceled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder: Provided, that if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office."

5. That the Defendant, R. E. Lee, in accordance with the provisions of said Oil & Gas Mining Lease, which is Exhibit "A", to Plaintiff's Complaint, on or about March 25th, 1936, which was as soon after the said Lease became effective as weather conditions would allow, started the drilling of a well on the W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 25, Township 33 North, Range 6 West, which land was covered by the said Oil & Gas Mining Lease; that the Defendant, R. E. Lee, completed said well in June of 1936 and that said well was a dry hole

and was plugged and [34] abandoned. That, at the request of the Plaintiff, the said well was drilled to a depth of 100 feet into the Madison limestone, although sulphur water was encountered on entering the Madison limestone, and it was ascertained that said well would not produce oil or gas in commercial quantities and that it was uneconomical, inadvisable, wasteful and useless to drill said well to a depth of 100 feet into the Madison Limestone. That said well was drilled and abandoned under the supervision of the duly constituted representative of the United States Geological Survey, located in the territory in which the land contained in the above described Oil & Gas Mining Lease is located. That said well was drilled at a total cost of approximately \$25,000.00. That said well was drilled to a total depth of 3,238 feet and was completed and abandoned on or about the 4th day of June, 1936. That prior to the completion of the above described well, five other wells were drilled in the immediate vicinity of the land covered by the said Oil & Gas Mining Lease, and these five wells were all dry holes and failed to produce oil or gas in commercial quantities and were abandoned. That the said well drilled by the said R. E. Lee, as above set forth, and the five other wells drilled in the immediate vicinity of the land described in the above described Lease, were drilled over a structural range covering all of the lands covered by the above described Oil & Gas Mining

Lease, and the geological information obtained from the drilling of the said six wells indicated that oil and gas could not be produced from the land covered by the above described Oil & Gas Mining Lease and that the drilling of an additional well or wells under the said Oil & Gas Mining Lease would be uneconomical, [35] inadvisable and wasteful and would not produce oil or gas in commercial quantities.

6. That after the completion of the said well drilled on the land covered by the above described Oil & Gas Mining Lease, the Defendant, R. E. Lee, had a study made by independent geologists of the probabilities of obtaining production of oil or gas from the land covered by the said Oil & Gas Mining Lease, and these geologists, after making a geological survey and study of the land covered by said Oil & Gas Mining Lease and of the territory in which said land was located, informed the said R. E. Lee that there was no reasonable probability of obtaining production of oil or gas from the lands covered by said Oil & Gas Mining Lease and that the drilling of an additional well or wells on said land was not justified and that the expenditure of any additional money in connection with the drilling of an additional well or wells on said land was not justified.

7. That after having completed the drilling of the above described well on the lands covered by the above described Oil & Gas Mining Lease and

after having obtained the above described geological information to the effect that there was no reasonable probability of obtaining production of oil or gas from the lands covered by the said Oil & Gas Mining Lease, and on or about December 4th, 1936, and in accordance with the provisions of Paragraph VII of said Oil & Gas Mining Lease, which Paragraph is set out in detail above, the said R. E. Lee made, executed and filed with the Secretary of the Interior of the United States of America, an application for consent to the surrender of the above described Oil & Gas Mining Lease, a copy of which application [36] is marked Exhibit "1", attached hereto, hereby referred to, and incorporated as a part of this First Affirmative Defense, the same as if set out at length herein.

8. That at the time of the filing of the said application for surrender of said Oil & Gas Mining Lease, the said R. E. Lee had paid all amounts then due, as provided in said Oil & Gas Mining Lease, and had complied with all of the requirements of said Oil & Gas Mining Lease and that said Oil & Gas Mining Lease was then in good standing and was in full force and effect, and the said R. E. Lee was not in default thereunder. That in connection with said application for consent to surrender of said Oil & Gas Mining Lease, the said R. E. Lee paid to the Secretary of the Interior of the United States of America the sum of \$1.00

and surrendered to the Secretary of the Interior all of the land covered by said Oil & Gas Mining Lease, all as required by Section 7 thereof. That said Oil & Gas Mining Lease had not been recorded.

9. That said Defendant, R. E. Lee, complied with each and every provision of Paragraph 7 of said Oil & Gas Mining Lease and did everything which he was obligated or required to do to entitle him to a cancellation of said Oil & Gas Mining Lease and to relieve himself and the Defendant, Standard Accident Insurance Company, from all obligations or liabilities thereunder, and to a cancellation without liability of the said Bond which is marked Exhibit "B", attached to Plaintiff's Complaint on file herein and incorporated as a part of this First Affirmative Defense, the same as if set out at length herein.

10. That the Secretary of the Interior of the United [37] States, without having any facts of any kind or character, upon which to support his action, refused to consent to the surrender of the said Oil & Gas Mining Lease, and the Defendant, R. E. Lee, was advised by letter dated July 9th, 1937, from the Commissioner of Indian Affairs, a copy of which letter is attached to Plaintiff's Complaint and marked Exhibit "C", and is hereby referred to and incorporated as a part of this First Affirmative Defense, the same as if set out at length herein, that the Department of the

Interior had denied his application for consent to the surrender of the said Oil & Gas Mining Lease.

11. That in view of the fact that the land covered by the above described Oil & Gas Mining Lease and the land in the vicinity thereof has been proved to be non-productive of oil or gas, and in view of the fact that there was no reasonable probability of obtaining production of oil or gas from the land covered by said Oil & Gas Mining Lease, and in view of the fact that it would have been uneconomical, wasteful, and useless to drill as additional well or wells on the land covered by the above described Oil & Gas Mining Lease, and in view of the fact that there were no facts upon which the Secretary of the Interior could refuse to consent to the surrender by the Defendant, R. E. Lee, of the above described Oil & Gas Mining Lease, the Secretary of the Interior, in refusing to consent to the surrender of said Oil & Gas Mining Lease, acted arbitrarily, unreasonably, without any facts upon which to base his action, and his action was an abuse of discretion and was contrary to law.

12. That this action of the Secretary of the Interior in denying the Defendant, R. E. Lee's application [38] for consent to the surrender by R. E. Lee of said Oil & Gas Mining Lease, was arbitrary, unreasonable, not based upon any facts or circumstances, was an abuse of discretion by and on the part of said Secretary, and was contrary to law.

13. That thereafter and on or about February 3rd, 1938, the Secretary of the Interior wrongfully and unlawfully declared said Oil & Gas Mining Lease cancelled and by letter dated February 3rd, 1938, a copy of which is marked Exhibit "2", attached hereto, hereby referred to and incorporated as a part of this First Affirmative Defense, the same as if set forth herein, informed said Defendant, R. E. Lee, that said Lease was cancelled and that he had been allowed thirty (30) days within which to pay the sum of \$6,000.00, which is the amount specified in the Bond, which is Exhibit "B" to Plaintiff's Complaint. That this action of the said Secretary was not based on any facts whatsoever, was an attempt to enforce a penalty, which is contrary to law, was an abuse of discretion, was arbitrary, unreasonable and unlawful.

14. That the said Oil & Gas Mining Lease was surrendered by the Defendant, R. E. Lee, in accordance with the provisions of Paragraph 7 thereof and that he was thereby relieved of all further obligations or liabilities thereunder and that the Defendants were thereby relieved of all obligations or liabilities under the said Bond, marked Exhibit "B", to Plaintiff's Complaint.

Wherefore, these Defendants having fully answered the complaint of plaintiff on file in the above entitled [39] cause pray that Plaintiff take nothing by virtue of his Complaint and that the

above entitled Complaint and case be dismissed against these answering Defendants.

CORETTE & CORETTE

By J. E. CORETTE, JR.

619 Hennessy Building

Butte, Montana

Attorneys for Defendants.

Service of the foregoing Answer is accepted by the undersigned and receipt of a copy thereof acknowledged this 23rd day of September, A. D., 1940.

W. D. MURRAY

Assistant U. S. Attorney and
Attorney for the Plaintiff.

[40]

EXHIBIT "1"

Cut Bank, Montana
December 4, 1936.

To the Secretary of Interior, U.S.A.,
Washington, D. C.

Attn. Mr. T. A. Walters, First Assistant
Secretary of Interior

Dear Sir:

Regarding: Oil and Gas Lease # 129 Cont-I-5-ind
7023 of January 24, 1936

Above lease to R. E. Lee of Cut Bank, Montana,
covering 470 acres located as follows:

E $\frac{1}{2}$ E $\frac{1}{2}$ E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 27,
T. 33 N, R 6 W, SW $\frac{1}{4}$ W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE

$\frac{1}{4}$ Sec. 26, T. 33 N, R 6 W, W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$
Sec. 25, T. 33 N, R 6 W, all in Glacier County,
Montana.

In June 1936 R. E. Lee completed one well as a dry hole, drilled into Madison Lime and abandoned in accordance with terms of lease. This well located in center of W $\frac{1}{2}$ NW $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 25, T. 33 N, R 6 W.

R. E. Lee then participated in the drilling of a well on adjoining land to the above described lease. This well was located in center of SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 26, T. 33 N, R. 6 W, and was a direct offset to above described lease and important in proving the further desirability in drilling above described lease. This well was completed as a dry hole in October 1936, drilled into Madison Lime and abandoned in accordance with regulations of Government leases.

Other developments on lands adjoining the above described lease such as a dry hole in Section 2, T. 32 N, R. 6 W, and a dry hole in SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 1, T. 32 N, R. 6 W, all point to the improbability of obtaining oil or gas production by further development or drilling on the above described lease.

R. E. Lee, therefore, requests cancellation of this lease, cancellation or release of bond, and release from all liability under bond, and requests this consideration on account of:

1. Having in good faith and strictly under terms of the lease completed part of the development required which proved unsuccessful.

2. And other developments on adjoining lands being unsuccessful and discouraging further development expense on this lease.

Yours very truly,
sgd. R. E. LEE [41]

EXHIBIT 2

United States
Department of the Interior
Office of Indian Affairs
Washington

Feb. 3, 1938

L-O&G
52143-37

Ira L. Quiat, Esq.,
Suite 415, Symes Building,
Denver, Colorado.

My dear Mr. Quiat:

Under date of August 12, 1937 you filed a statement by Mr. R. E. Lee in answer to notice to show cause why an oil and gas mining lease, No. 129, on Blackfeet tribal Indian lands in Montana, should not be canceled and he held liable for the payment of \$6,000, the penalty of the bond, for failure to comply with its drilling requirements.

The matter was referred to the Blackfeet Tribal Council and the action of the Council was opposed to accepting surrender of the lease and relieving the lessee from the payment of the above mentioned sum. The Department has carefully considered the matter and feels that the wishes of the Indians are reasonable and should be followed. The lease was accordingly canceled January 20 and Mr. Lee and his surety were held liable for the payment of the full amount of the bond and for the proper conditioning of the leased premises. As attorney for the lessee, you are accordingly notified that he will be allowed 30 days from date of this letter within which to pay \$6,000 to the Superintendent of the Blackfeet Indian Agency, Browning, Montana, and properly to condition the leased premises, or show cause why suit should not be brought to collect the said amount and for any additional sum that may be determined properly to be due the Indians for failure properly to plug and abandon the wells on the leased premises or otherwise properly condition the premises.

A copy of this letter is being sent to the Standard Accident Insurance Company, surety on Mr. Lee's bond, for its information and as notice in the premises and for such action as it may care to take in the matter.

Sincerely yours,

WILLIAM ZIMMERMAN, JR.,
Assistant Commissioner.

[Endorsed]: Filed Sept. 23, 1940. [42]

[Title of District Court and Cause.]

**MOTION FOR JUDGMENT OF
THE PLEADINGS**

Comes now the plaintiff, the United States of America, and moves that judgment be entered for plaintiff on the pleadings. In support of this motion plaintiff alleges:

I.

That this Court by denying defendants' motions to dismiss dated the 12th day of January, 1940, has already ruled that plaintiff's complaint states a cause of action upon which relief may be granted;

II.

That defendants' answer makes but three defenses, all of which must fail as follows:

1. Defendants' first defense that "The complaint fails to state a claim against defendants, or either of them, upon which relief can be granted" is obviously without merit and need not be examined for the reason that as stated above this Court has already ruled against defendants on this defense in denying their motions to dismiss. [46]

2. Defendants' second defense, which consists of denials of certain statements made in plaintiff's complaint, must fail for the reason that it admits all of the ultimate facts alleged in the complaint necessary to the statement of plaintiff's cause of action. (See accompanying memorandum of points and authorities).

3. Defendants' third or affirmative defense that defendants terminated their obligation under the lease by surrender and that in view of the dry wells drilled in the vicinity the refusal of the Secretary of the Interior to accept the surrender was arbitrary and void and his demand for the payment of the bond was an attempt to enforce a penalty must fail for the reason that defendants have been unable to allege any fact to alter the express requirement of the lease that a surrender thereof must be with the consent of the Secretary of the Interior; that the requirement of consent implies the full and unqualified power to refuse the consent; that the drilling of wells by other persons upon land adjacent to the leased premises is not a valid substitute for the drilling requirements of the lease and until defendants have tested the leased premises as required by the lease itself, namely, one well for every forty acre tract, defendants have no basis for the assertion that the Secretary of the Interior has acted arbitrarily in refusing to accept a surrender of the lease; that the provision in the lease that defendants will pay the full amount of the bond should the lessee fail or refuse to drill as provided in paragraph 4 thereof is not a penalty but a valid provision for liquidated damages and is enforceable to the full amount without allegation or proof of damage. (See accompanying memorandum of points and authorities). [47]

Wherefore plaintiff prays judgment against the defendants and each of them in the sum of \$6,000.00,

the amount of the bond, together with interest thereon at the rate of 6% per annum from the date of the demand made for payment thereof, namely, the 3rd day of February, 1938.

R. LEWIS BROWN

Ass't. U. S. Attorney.

Service of the foregoing and receipt of a true and correct copy is hereby acknowledged this 27th day of December, 1940.

CORETTE AND CORETTE

By ROBERT CORETTE

Attorneys for the Defendants.

[Endorsed]: Filed Dec. 28, 1940. [48]

[Title of District Court and Cause.]

DEFENDANTS' CROSS MOTION FOR JUDGMENT ON THE PLEADINGS

Come Now the Defendants, R. E. Lee and Standard Accident Insurance Company, a corporation, and move the Court for a judgment on the pleadings, as prayed for in Defendants' Answer, in favor of the Defendants and against the Plaintiff, upon the ground and for the reason that the Plaintiff, by filing a motion for judgment on the pleadings, has admitted the affirmative allegations of Defendants' Answer and the pleadings in the case now raise no material issue of fact, but only questions of law, and under said pleadings the Defendants are entitled to the judgment prayed for as against the Plaintiff.

This Motion of Defendants for judgment on the pleadings should be granted because it is now admitted that the Secretary of the Interior, in refusing to consent to the surrender by the Defendant, R. E. Lee, of the oil and gas lease involved in the above entitled action, acted arbitrarily, unreasonably and without any facts upon which to base his action, and that his refusal to consent to the surrender of the oil and gas lease involved was an abuse of discretion and was contrary to law. [50]

This Motion is based upon the pleadings and upon the records and files in the above entitled action.

Dated this 1st day of April, A. D., 1941.

CORETTE & CORETTE

By J. E. CORETTE, JR.

CORETTE & CORETTE

619 Hennessy Building
Butte, Montana

Attorneys for Defendants.

Service of the foregoing Defendants' Cross Motion for Judgment on the Pleadings admitted, and copy thereof received this 3rd day of April, 1941.

JOHN B. TANSIL

U. S. Atty.

R. LEWIS BROWN

Asst. U. S. Atty.

Attorneys for Plaintiff,

United States of
America.

[Endorsed]: Filed Apr. 3, 1941. [51]

[Title of District Court and Cause.]

ORDER DENYING MOTIONS FOR JUDGMENT ON THE PLEADINGS

The questions presented at this time in the above entitled cause arise over motions made by the respective parties for Judgment on the pleadings based upon the reasons therein set forth.

Exhaustive briefs were filed and the material questions ably discussed by both sides. Most of the problems are not new, and have come before this court on other occasions, as counsel for the plaintiff has indicated.

The court is satisfied that the motions of defendants for judgment on the pleadings should be denied, and such is the court's order. The only remaining question to be determined is whether there is here presented by the answer a substantial admission of the material allegations of the complaint. Counsel has analyzed the allegations of the complaint and exhibit, which is a part of the complaint, and the answer, and made a forcible argument in favor of his motion, which the court has considered in connection with the arguments of opposing counsel, together with the numerous authorities cited, many of which the court has heretofore had occasion to consult in like or similar cases. If defendants could be held to have admitted substantially the material allegations of the complaint, then there would appear to be no other alternative than to grant the plaintiff's motion for judgment.

The court has endeavored carefully to analyze the several paragraphs of the complaint and answer and is unable to agree with counsel that there exists a substantial admission of every material allegation of the complaint, consequently the court is of the opinion that plaintiff's motion should also be denied, and it is so ordered.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed Aug. 27, 1941. [58]

[Title of District Court and Cause.]

MOTION TO AMEND ANSWER

Come Now the Defendants in the above entitled case and request leave of the above entitled Court in the above entitled cause for permission to amend the Answer on file in the above entitled cause in the following particulars:

I.

By adding between Paragraph 8 and Paragraph 9 of the Third Defense to said Answer the following paragraphs:

“8-a. That Paragraph 8 of the Oil & Gas Lease, which is Exhibit A to Plaintiff's Complaint and which is hereby referred to and incorporated by reference as a part of this Answer, provides as follows:

'8. This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided. That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental or acreage, unless agreed to by both parties.'

That the regulations governing the leasing of tribal lands for mining purposes, in effect at the time that the said Oil & Gas Lease became effective, were approved by the Secretary of Interior on July 23, 1924, and contained Paragraph 27, relating to cancellation of leases, which paragraph read as follows: [64]

'27. A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated. When the lessee applies for cancellation of an approved lease he shall pay a surrender fee of \$1, and all royalties and rents due to the date of completion of such application must be paid before the same will be considered, and the parts of the lease held by the lessor and the lessee shall be surrendered, together with a properly executed and

recorded release of record if the lease has been recorded. No part of any advance royalties shall be refunded to the lessee, nor shall he be relieved from his obligation to pay advance royalties and rentals in lieu of development annually when due by reason of any subsequent surrender or cancellation of the lease. Upon cancellation of a lease the lessor shall be entitled to take immediate possession of the land.'

8-b. That R. E. Lee, in applying to the Secretary of Interior for consent to the surrender of the said Oil & Gas Lease, which is Exhibit A to Plaintiff's complaint, as set forth in Exhibit 1 to this Answer, complied with each and all of the requirements of Paragraph 27 of said Rules and Regulations and presented to the Secretary of the Interior good cause of why the said Oil & Gas Lease should be cancelled.

8-c. After receiving the letter, dated July 9th, 1937, from William Zimmerman, Assistant Commissioner, which is Exhibit C to Plaintiff's Complaint in the above entitled action and which is hereby referred to and incorporated as a part of this Answer, the said R. E. Lee filed, within the time allowed, with the Secretary of the Interior a statement showing cause why the said Oil & Gas Lease should not be cancelled and why his application for con-

sent to the surrender of said Oil & Gas Lease should be approved. The said statement filed with the Secretary of the Interior by the said R. E. Lee in answer to the said letter of July 9th, 1937, is attached hereto, marked Exhibit 3, hereby referred to and incorporated as a part of this Answer."

This request for leave of court to amend the Answer, as hereinbefore set forth, is made for the reason that the Defendants in the above entitled case are not absolutely certain that evidence of the matters referred to in these amendments would be admissible under the allegations of the Answer, [65] although they believe that even a strict construction of the allegations of the answer would allow the introduction in evidence of all of the matters and things alleged in the foregoing amendments.

This request is made for the further reason that the Defendants believe that the case cannot be fully and adequately presented to the Court or considered by the Court without presenting and giving consideration to the rules and regulations of the Secretary of the Interior, which are a part of the Oil & Gas Lease, as provided in Paragraph 8 of that Oil & Gas Lease, and for the further reason that this case cannot be adequately presented or considered without the Court having before it the statement made by the said R. E. Lee to the Secretary of the Interior in answer to the said letter, dated July 9th, 1937, advising R. E. Lee that he should show cause why the Lease should not be cancelled.

This request is based on the allegations contained herein and on all of the papers on file in the above entitled action.

Respectfully submitted,
CORETTE & CORETTE
By J. E. CORETTE
Attorneys for Defendants. [66]

EXHIBIT 3

Hon. Harold L. Ickes
Secretary of the Interior,
Washington, D. C.

Dear Sir:
Blackfeet Tribal Lease No. 129 and Allotted No. 137

On September 25, 1935, at a Public Auction held at the Blackfeet Agency, Browning, Montana, Mr. Geo. H. Campbell was the successful bidder on Tract 1 consisting of the E $\frac{1}{2}$ E $\frac{1}{2}$ E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 27, E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 27, SW $\frac{1}{4}$ Sec. 26, T 33 N, R 6 W, containing 250 acres and Tract 2 consisting of the W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ Sec. 26, W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 25, T 33 N, R 6 W, containing 220 acres.

Mr. R. E. Lee negotiated with Mr. Campbell for the two tracts before the lease was drawn and the lease was then drawn as one lease in the name of R. E. Lee.

A Bond for the sum of \$6,000.00 was obtained by Mr. Lee from the Standard Accident Insurance

Co. with Fred Goodstein and the American Iron and Metal Company of Denver, Colorado, as indemnitors.

On December 9, 1935, the executed Lease and Bond together with a cashier's check for \$740.00 to cover the remainder due on the bonus and the advance annual rental were delivered to Mr. O'Hara, Supt. of the Blackfeet Agency.

Mr. Lee was advised by letter on February 4, 1936, that his lease had been approved as Tribal Lease No. 129 by the Secretary of the Interior as of January 24, 1936.

Prior to the approval of the lease by the Secretary, Mr. Lee had successfully negotiated with Mr. Fred Goodstein and the American Iron and Metal Company of Denver, Colorado, for the full development of the lease according to the terms of the lease.

Unusually bad weather prevented Mr. Goodstein and the American Iron and Metal Company from beginning immediate development work but as soon as it was possible a well was begun in the center of the W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 25, T 33 N, R 6 W. This location was chosen as being the highest structural position on the lease. [67]

The well was spudded on March 25, 1936, and diligently drilled in a good workmanlike manner into the upper Cut Bank sand. The upper Cut Bank sand was found at 2900 feet and was 80 feet thick. It was very hard with practically no porosity. Only a slight show of oil was found at 2970 feet.

The lower Cut Bank sand, which is the main producing horizon in the Cut Bank field, was not present.

Every effort was made to make a commercial well of the small showing found at 2970 feet by shooting, but they were unsuccessful.

As soon as it was realized that a commercial well could not be obtained from the small showing in the upper Cut Bank sand, the well was deepened through the very cavey Ellis shale to the top of the Madison lime at 3140 feet where sulphur water was encountered. The well was drilled 100 feet into the Madison limestone as required by the provisions of the lease at great expense because of the water and cavey nature of the Ellis shale.

The well was then plugged and abandoned according to the regulations and under the supervision of the United States Geological Survey.

A very difficult and expensive fishing job during the deepening of the well from the upper Cut Bank sand into the Madison limestone resulted in a cost of approximately \$25,000 for the drilling and abandoning of the well.

Prior to the drilling of the R. E. Lee Tribal 129 No. 1, twelve wells had been drilled to the Madison limestone in the Cut Bank field, none of them found oil and all of them found sulphur water.

Approximately \$8,000.00 of the total cost of the well was spent to comply with the terms of the lease after it was known that a commercial well could not be obtained.

Under ordinary field practice a non-commercial well can be abandoned for approximately \$500.00.

During the drilling of the R. E. Lee Tribal 129 No. 1 well, Mr. Lee and associates had obtained at a public sale at Browning, [68] Montana, Allotted Lease No. 137 immediately adjacent to Tribal 129 on the North and to obtain more geological data regarding Lease No. 129, Mr. Fred Goodstein and the American Iron and Metal Company participated in the drilling of a well offsetting Lease No. 129 as shown on the enclosed plat.

The R. E. Lee Allotted 137 Well No. 1 was drilled 100 feet into the Madison Lime without finding the Cut Bank sand present and finding sulphur water in the Madison Limestone. The cost of this well was approximately the same as for the well on Tribal No. 129.

This well was plugged and abandoned according to the regulation and under the direction of the United States Geological Survey.

Subsequent to the drilling of the two R. E. Lee wells, there has been three other wells completed to the South and South and East of the R. E. Lee Tribal No. 129 which have been dry and abandoned, all of them finding the Cut Bank sand very poorly developed or entirely absent.

These wells have been drilled over a structural range covering the entire Lee Leases.

It is the opinion of geologists who are familiar with the entire development of the Cut Bank field

that there is practically no chance for commercial production on either of the Lee Leases.

Prior to negotiations for Tribal Lease No. 129, Mr. Lee discussed the operating regulations and nature of the Bond required with members of the United States Geological Survey.

He was informed that the Bond required was for the protection of the lease to see that proper drilling, casing and abandonment procedure were followed. He was also informed that should a dry hole be completed on one of the leases and he did not feel justified in further development that he could ask for cancellation of his lease without penalty to himself.

Quoting from the Notice of Sale of Oil and Gas Leases dated at Browning, Montana, August 30, 1935, which advertised Tract 1 and 2 of which Tribal Lease No. 129 is composed: "The lessee will not be required to furnish any special bond but the usual bond prescribed by the regulations of the Secretary of the Interior must be filed." [69]

Quoting from the Oil and Gas Mining Lease issued to R. E. Lee on Tribal No. 129—Sec. 7: "The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of One Dollar and have this lease cancelled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder, pro-

vided, that if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office."

The Lessee, R. E. Lee, through Fred Goodstein and the American Iron and Metal Company, completed a dry hole that was carried to the depth prescribed in the terms of the lease, and was abandoned under the supervision of the U. S. Geological Survey.

The lessee participated in the drilling of a well the prescribed depth into the Madison limestone which disproved production on Allotted Lease No. 137 and also further disproved commercial production on Tribal Lease No. 129.

The lessee and his associates, Mr. Fred Goodstein and the American Iron and Metal Company, did not think there was sufficient chance to find commercial production on either lease to warrant the expenditure of additional money and asked to be released from further obligation without penalty on December 4, 1936.

Should the Commissioner of Indian Affairs continue to ask for payment on the Bond after a dry hole has been drilled on the lease for failure to drill other dry holes, it will have a very detrimental effect on future sales of Indian lands in the Cut Bank field. No prudent operator would obligate himself to drill where there is no release except by forfeiture of his Bond should his first venture be unsuccessful.

In view of the above facts, we feel that we are entitled to have this lease cancelled without penalty.

Yours very truly,
R. E. LEE.

[Endorsed]: Filed Nov. 25, 1941. [70]

[Title of District Court and Cause.]

RECORD OF TRIAL

This cause came on regularly for trial this day, Mr. R. Lewis Brown and Mr. W. D. Murray, Assistants to the District Attorney, being present and appearing for the United States, Mr. J. E. Corette, Jr., Mr. Allen Kendrick Smith and Sam B. Chase, Jr., appearing for the defendants. Mrs. Mary E. Pearson acted as court reporter.

Thereupon in view of an understanding between counsel for the parties, expressed in open court, as to certain proof in the case, the defendants withdrew their motion heretofore filed herein for leave to amend their answer.

Thereupon it was agreed by all parties that a trial by jury be waived and that the case be tried to the court without a jury.

Thereupon counsel for the defendants admitted that a demand was made upon the defendants for the payment of the sum of \$6000.00 as alleged in the plaintiff's complaint herein.

Thereupon a certain letter marked as Plaintiff's Exhibit No. 1, was offered by the plaintiff and received in evidence, whereupon the plaintiff rested.

Thereupon defendants offered certain documents which were marked as defendants' exhibits Nos. 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, which were received in evidence. Thereupon certain facts were agreed to by counsel for the respective parties.

Thereupon Robert E. Lee and J. E. Hupp were sworn and examined as witnesses for the defendants, and three maps marked as defendants' exhibits Nos. 12, 13 and 14, were offered and received in evidence, whereupon the defendants rested. Thereupon the plaintiff rested and the evidence closed.

Thereupon the defendants, and each of them, at the close of all of the evidence, moved the court for a dismissal of the case and for judgment in favor of the defendants and against the plaintiff, on grounds stated to the court. Thereupon the plaintiff renewed its motion for judgment as prayed for in its complaint, and said motions were taken under advisement by the court.

Thereupon court ordered that the plaintiff be granted thirty days after receipt of the transcript of the evidence, within which to serve and file its brief herein; that the defendants be granted thirty days thereafter within which to serve and file their brief, and that the plaintiff be granted thirty days from that time within which to file a reply brief if

so desired; whereupon the cause will be considered as submitted to the court and taken under advisement.

Court further ordered that the court reporter, Mrs. Mary E. Pearson, be permitted to withdraw the exhibits in the case, for her use in preparing transcript of the evidence.

Entered in open court at Great Falls, Montana, Dec. 1, 1941.

C. R. GARLOW,
Clerk. [75]

[Title of District Court and Cause.]

**PLAINTIFF'S PROPOSED FINDINGS OF
FACT AND CONCLUSIONS OF LAW**

This cause came on regularly for trial before the Court, the Honorable Charles N. Pray, Judge presiding, without a jury at Great Falls, Montana, on December 1, 1941, plaintiff being represented by R. Lewis Brown and W. D. Murray, Assistant Attorneys of the United States, in and for the District of Montana, the defendant R. E. Lee being present in court and represented by his attorneys, Messrs. Corette & Corette and Kendrick Smith, Esq., and the defendant Standard Accident Insurance Company, a corporation, being represented by its attorneys, Messrs. Corette & Corette and Kendrick Smith, Esq.; thereupon oral and documentary evi-

dence was introduced and at the close of all the evidence the parties asked for and were by the Court granted time within which to prepare, serve and lodge with the Clerk their written briefs and proposed findings of fact and conclusions of law; that thereafter briefs on behalf of each of the parties hereto and proposed findings of fact and conclusions of law were so prepared, served and lodged with the Clerk, and thereupon the cause was taken under advisement by the Court for consideration and decision, and the Court having considered all of the evidence introduced at the trial of the case and admissions and stipulations of counsel made during the trial and the briefs filed on behalf of the parties hereto, [77] and being fully advised in the premises, makes these its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

That at all of the times mentioned herein, the Plaintiff was, is and continues to be the owner in fee simple of the

E/2 E/2 E/2 W/2 NE/4, E/2 SE/4, Section 27, T. 33, N., R. 6 W., M. P. M.

SW/4, W/2 NW/4 NE/4, SE/4, Section 26, T. 33, N., R. 6 W., M. P. M.;

W/2 W/2 SW/4, Section 25, T. 33, N., R. 6 W., M. P. M. containing 470 acres.

located upon and within the Blackfeet Indian Reservation, Glacier County, State and District of

Montana, together with all the oils and minerals contained beneath the surface of the said property, and the same and the whole thereof being held by the United States in trust for the use and benefit of the Blackfeet tribe of Indians, residing on said Indian Reservation and its individual wards residing thereon.

II.

That the defendant Standard Accident Insurance Company, a corporation, was, continued to be and now is a corporation duly and regularly organized and existing, and as such authorized to be, act and become a surety.

III.

That on or about the 26th day of September, 1935, the plaintiff, acting by and through the Superintendent and special disbursing agent of the said Blackfeet tribe of Indians and for the use and benefit of the said tribe and the Indian wards residing on the said Reservation, entered into the lease in writing which is attached to the plaintiff's complaint as Exhibit "A" and which said lease was duly and regularly approved by the said Secretary of the Interior on the 24th day of January, 1936. [78]

IV.

That in order that the said lease become effective, said R. E. Lee, as principal, and the said Standard Accident Insurance Company, a corporation, as

surety, duly and regularly made, executed and delivered to the plaintiff on the 10th day of December, 1935, their certain bond and undertaking which is attached to the plaintiff's complaint as Exhibit "B", and which said bond and undertaking was approved on the 24th day of January, 1936, duly and regularly by the Secretary of the Interior, and thereupon said lease came into effect.

V.

That the said lease provided among other things as follows:

"(4) The lessee agrees to begin drilling operations on the land covered by this lease within ninety (90) days from date of the approval hereof by the Secretary of the Interior, and to drill at least (four) wells on the premises within one year from the date of such approval * * *. If the lessee shall fail to drill any or all of the wells as herein provided, such failure shall be a violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease, but such cancellation shall not in any way serve to release or relieve the lessee or surety from the covenants and obligations to pay any accrued obligation."

VI.

That upon the said lease becoming in full force and effect, the defendant R. E. Lee entered into

and upon the leased premises and took possession thereof and commenced drilling operations thereon, but that notwithstanding the provisions in said lease said R. E. Lee did not drill four wells upon the said leased premises within one year from the date of the approval of the lease as he had promised and agreed to do, or at all, but drilled only one well on the said leased premises during the said time and wrongfully failed, refused and neglected to drill [79] the said four wells within the said time, or any more than one well within the said time.

VII.

That the said R. E. Lee, in failing and refusing to drill four wells upon the said leased premises within one year from the time the said lease became effective as he promised and agreed to do, breached the said lease in that regard and wrongfully failed to perform the same, and because of the said breach of the provision of said lease by the said R. E. Lee, the Secretary of the Interior, on the 20th day of January, 1938, duly and regularly cancelled the said lease.

VIII.

That on the 3rd day of February, 1938, a demand was made upon the defendants for the payment of the sum of \$6000.00, the amount agreed to be paid by them upon the breach of the terms of the said lease by the defendant R. E. Lee, but the said defendants and each of them failed, refused and

neglected to pay the said sum of \$6,000.00, or any part or portion thereof, and continued to fail, refuse and neglect to pay the said sum of \$6,000.00, or any part or portion thereof.

IX.

That except as the same may be contrary to any express finding of fact herein made, the Court finds generally all of the facts in issue in favor of the plaintiff and against the defendants and finds generally that plaintiff has sustained by competent proof all of the material allegations of its complaint.

From the foregoing facts, the Court draws the following:

CONCLUSIONS OF LAW

I.

That this Court has jurisdiction hereof.

II.

That because of the failure of the defendant R. E. Lee to perform the obligations on him to be performed under said [80] lease and to drill four wells within one year from the effective date thereof, said R. E. Lee breached the said lease, and the Secretary of the Interior, in all respects, acted lawfully in cancelling and terminating the same, and that upon such termination and cancellation by the Secretary of the Interior the defendants and each of them became liable to the plaintiff as provided

in said lease and the said bond executed in pursuance thereof.

III.

That the plaintiff is entitled to a judgment in its favor and against the defendants and each of them for the sum of \$6,000.00, together with interest thereon at 6% per annum from the 3rd day of February, 1938, and the plaintiff's costs herein necessarily expended.

Done and dated June 27th, 1942.

CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 27, 1942. [81]

[Title of District Court and Cause.]

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Come now the Defendants, R. E. Lee and Standard Accident Insurance Company, a corporation, and present Defendants' Proposed Findings of Fact and Conclusions of Law attached hereto, and petition the Court to adopt the same.

CORETTE & CORETTE
By KENDRICK SMITH
619 Hennessy Building
Butte, Montana,
Attorneys for Defendants

Service of the Defendants' Proposed Findings of Fact and Conclusions of Law hereto attached acknowledged and a copy thereof received this 30th day of April, 1942.

R. LEWIS BROWN

W. D. MURRAY

Assistant Attorneys of the
United States in and for the
District of Montana.

[Endorsed]: Filed May 1, 1942. [83]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause came on regularly for trial before the Court, the Honorable Charles N. Pray, Judge presiding, without a jury, at Great Falls, Montana, on December 1, 1941, Plaintiff being represented by R. Lewis Brown and W. D. Murray, Assistant Attorneys for the United States in and for the District of Montana, the Defendants, R. E. Lee and Standard Accident Insurance Company, a corporation, being represented by their attorneys Messrs. Corette & Corette. Thereupon oral and documentary evidence was introduced and at the close of all the evidence the parties asked for and were by the Court granted time within which to prepare, serve and lodge with the Court their written briefs and proposed findings

of fact and conclusions of law. Thereafter briefs on behalf of each of the parties hereto and proposed findings of fact and conclusions of law were so prepared, served and lodged with the Court, and thereupon the cause was taken under advisement by the Court for consideration and decision, and the Court having considered all of the evidence at the trial of the case and admissions and stipulations of [84] counsel made during the trial and briefs filed on behalf of the parties hereto, and being fully advised in the premises, makes these its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

I.

That at all of the times mentioned herein, the Plaintiff was, is and continues to be the owner in fee simple of the

E/2 E/2 E/2 W/2 NE/4, E/2 SE/4, Section 27, T. 33, N., R. 6 W., M. P. M.

SW/4, W/2 NW/4 NE/4, SE/4, Section 26, T. 33, N., R. 6 W., M. P. M.;

W/2 W/2 SW/4, Section 25, T. 33, N., R. 6 W., M. P. M. containing 470 acres

located upon and within the Blackfeet Indian Reservation, Glacier County, State and District of Montana, together with all the oils and minerals contained beneath the surface of the said property, and the same and the whole thereof being held by the United States in trust for the use and benefit of the

Blackfeet tribe of Indians, residing on said Indian Reservation and its individual wards residing thereon.

II.

That the defendant Standard Accident Insurance Company, a corporation, was, continued to be and now is a corporation duly and regularly organized and existing, and as such authorized to be, act and become a surety.

III.

That on or about the 26th day of September, 1935, the plaintiff, acting by and through the Superintendent of the said Blackfeet tribe of Indians, entered into the lease in writing which is attached to the plaintiff's complaint as Exhibit "A" and which said lease was duly and regularly approved by the said Secretary of the Interior on the 24th day of January, 1936.

IV.

That in order that the said lease become effective, said [85] R. E. Lee, as principal, and the said Standard Accident Insurance Company, a corporation, as surety, duly and regularly made, executed and delivered to the plaintiff on the 10th day of December, 1935, their certain bond and undertaking which is attached to the plaintiff's complaint as Exhibit "B", and which said bond and undertaking was approved on the 24th day of January, 1936, duly and regularly by the Secretary of the Interior, and thereupon said lease came into effect.

V.

That the said lease provided among other things as follows:

“(4) The lessee agrees to begin drilling operations on the land covered by this lease within ninety (90) days from date of the approval hereof by the Secretary of the Interior, and to drill at least (Four) wells on the premises within one year from the date of such approval * * *. If the lessee shall fail to drill any or all of the wells as herein provided, such failure shall be a violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease, but such cancellation shall not in any way serve to release or relieve the lessee or surety from the covenants and obligations to pay any accrued obligation.”

“(7) The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of one dollar and have this lease canceled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder: Provided, That if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office.

“(8) This lease shall be subject to the regulations of the Secretary of the Interior now or

hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental or acreage, unless agreed to by both parties."

That the regulations of the Secretary of the Interior [86] governing the leasing of tribal lands for mining purposes approved by Hubert Work, Secretary of the Interior on July 23, 1924, and in force and effect during all of the times herein involved provided in article 27 thereof as follows:

"27. A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated. When the lessee applies for cancellation of an approved lease he shall pay a surrender fee of \$1, and all royalties and rents due to the date of completion of such application must be paid before the same will be considered, and the parts of the lease held by the lessor and the lessee shall be surrendered, together with a properly executed and recorded release of record if the lease has been recorded. No part of any advance royalties shall be refunded to the lessee, nor shall he be relieved from his obligation to pay

advance royalties and rentals in lieu of development annually when due by reason of any subsequent surrender or cancellation of the lease. Upon Cancellation of a lease the lessor shall be entitled to take immediate possession of the land."

VI.

That the Defendant R. E. Lee entered into and upon the leased premises, commenced drilling operations thereon and drilled one well at a cost of approximately \$25,000, of which sum \$8,000 was expended to comply with the terms of the lease after it was known that a commercial well could not be obtained. That said well was a dry well and was completed and abandoned within one year after the date of the approval of said lease and bond.

VII.

That upon the completion of the drilling of the said well upon the said leased premises within one year from the time the said lease became effective, the said R. E. Lee made applications to the Secretary of the Interior for cancellation and surrender of the said lease in accordance with and complying with the provisions of paragraphs 7 and 8 of said lease and article 27 of the aforesaid Regulations of the Secretary of the Interior. [87] That said applications for cancellation and surrender were properly made and all of the terms and conditions therefor were complied with by the said R. E. Lee. That the said applications of the said R. E. Lee for cancella-

tion and surrender constituted a showing of good cause for said requested cancellation and surrender by a showing which the court finds to be true as follows:

- (a) That the said well drilled upon said leased premises was a dry well.
- (b) That a similar well drilled by the said R. E. Lee upon an immediately adjacent tract of land was a dry well.
- (c) That three other wells drilled in the immediate vicinity were dry.
- (d) That the aforesaid five wells were drilled over a structural range covering the entire premises of the said leased premises.
- (e) That geologically there was no chance of securing oil or gas by drilling upon the said leased premises.
- (f) That the local field officers of the Geological Survey were of the opinion and so reported to the Secretary of the Interior that the lands had been "adequately tested".
- (g) That the Supervisor of the Geological Survey reported officially to the Secretary of the Interior, through a letter addressed to the Superintendent of the Blackfeet Indian Agency, as follows:

"** * I cannot justify any requirement for the additional three wells in view of the dry hole drilled on the lease, and the dry hole drilled in the SW NE Section 26, T. 33 N., R. 6 W.

"It is therefore recommended that the request for cancellation be accepted and the fee of \$1.00 be deposited to the credit of the Tribe."

[88]

VIII.

That the Secretary of the Interior refused the said applications for cancellation and surrender and made demand upon the Defendants for the payment of the said bond. That said demand for said payment of the bond was wrongful and unlawful.

IX.

That in refusing and rejecting the said applications for cancellation and surrender the Secretary of the Interior did not have any fact or circumstance upon which to base or to justify the said refusal and rejection.

X.

That the Secretary of the Interior acted arbitrarily and unreasonably in rejecting and refusing the said application for cancellation and surrender.

XI.

That in refusing and rejecting the said application for surrender the Secretary of the Interior violated the terms of paragraph 7 of said lease in that his consent to a surrender thereunder could not be arbitrarily and unreasonably withheld.

XII.

That in refusing and rejecting the applications for cancellation and surrender the Secretary of the

Interior violated the terms of paragraph 8 of said lease and of article 27 of the said Regulations in that good cause was shown for said application for cancellation.

XIII.

That a payment of the amount of said bond by the Defendants would constitute a bonus or gratuity to the Plaintiff and that no damage of any kind or character has been suffered by Plaintiff. [89]

XIV.

That except as the same may be contrary to any express finding of fact herein made, the Court finds generally all of the facts in issue under the Third Defense, as amended, of said Defendants in favor of the said Defendants and against the Plaintiff, and finds generally that Defendants have sustained, by competent proof, all of the material allegations of their said Third Defense, as amended.

From the foregoing facts the Court draws the following conclusions:

CONCLUSIONS OF LAW

I.

That this Court has jurisdiction hereof.

II.

That the Secretary of the Interior had no power or authority to refuse and reject the said applications for cancellation and surrender and that the said Secretary of the Interior acted contrary to law

in refusing the said applications for cancellation and surrender of said lease.

III.

That the purported termination and cancellation by the Secretary of the Interior of said lease and the demand for payment of the said bond was without force and effect.

IV.

That Plaintiff is not entitled to a judgment in its favor and that Plaintiff's Complaint should be dismissed against the said Defendants.

V.

That Defendants are relieved of all obligations and liabilities under the said lease and the said bond.

Done and dated, 1942.

Judge. [90]

[Title of District Court and Cause.]

OPINION OF THE COURT

The above entitled cause was tried to the court without a jury, and is now submitted on briefs and proposed findings and conclusions for decision.

The court has endeavored carefully to consider the transcript, briefs and principal authorities re-

lied upon by counsel, in their respective motions for judgment on the pleadings as well as those submitted since the trial.

Plaintiff's counsel assumes that the court in the memorandum and order denying the motions of both parties for judgment on the pleadings indicated that if defendants could have been held to have admitted all the material allegations of the complaint that there would then have appeared to be no other alternative than to grant plaintiff's motion. And the court is still of the same opinion, notwithstanding able arguments to the contrary. Where the Secretary of the Interior enters into a lawful lease for the drilling of four wells on the lands leased within a year—that is to say, one well on each forty acres thereof, the weight of authority and the better reasoning would seem to indicate that on a failure of lessee to comply with his agreement he can not compel the Secretary to cancel the lease on a showing that he has drilled one well which was dry and that oil operators on adjacent territory have had no better success, and therefore he may decline to comply with his contract and drill three more wells because in his opinion there is no prospect of oil. It has been said that gold is where one finds it, and that saying would probably equally apply in case of oil and gas. It is common knowledge that the opinions of experts differ widely as to the probability or improbability of finding oil or gas underlying certain lands. [92]

The provisions of the lease and the regulations cited by counsel and the showing made would not control the secretary's judgment or require the court to override his decision in a purely administrative matter involving his discretion. It seems quite evident that in entering into the lease the test required by the Secretary as to the presence of oil or gas on the premises leased was the drilling of four wells within a year—one well on every forty acre tract. What the defendants in effect are contending for is, that in their case the Secretary will not be permitted to exercise his independent judgment but is compelled to cancel the lease because defendants assert that good cause has been established, and that he has been acting arbitrarily.

This court is of the opinion that the Secretary of the Interior had the authority to refuse cancellation of the lease under the contract and state of facts shown here. The test required by the Secretary and embodied in the contract as a substantial requirement of performance had not been made. Consequently the decision will have to be in favor of the plaintiff, as heretofore indicated, and appropriate findings and conclusions may be submitted.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed Jun. 22, 1942. [93]

In the District Court of the United States
District of Montana, Great Falls Division

No. 150

UNITED STATES OF AMERICA,

Plaintiff,

v.

R. E. LEE and STANDARD ACCIDENT INSUR-
ANCE COMPANY, a Corporation,
Defendants.

JUDGMENT

This case came on regularly before the Court, Honorable Charles N. Pray, Judge presiding without a Jury, at Great Falls, Montana, on the 1st day of December, 1941; the plaintiff was represented by R. Lewis Brown and W. D. Murray, Assistant Attorneys of the United States in and for the District of Montana, and the defendant, R. E. Lee, was present in Court and represented by his counsel, John E. Corette Jr., and Kendrick Smith, and the defendant, Standard Accident Insurance Company, a corporation, was represented by its counsel, John E. Corette Jr., and Kendrick Smith; thereupon, the parties announced themselves ready for trial and evidence was introduced by and on behalf of each of the parties to the action, and at the close of all of the evidence, each of the parties requested and were by the Court granted time

within which to prepare, serve and file written briefs; that thereafter, each of the parties hereto did prepare, serve and file their written briefs and arguments and the matter was then submitted to the Court for consideration and decision, and on the 22nd day of June, 1942, the Court, after considering all of the evidence and arguments of counsel and the law, and being fully advised in the premises, rendered its decision in favor of the plaintiff and against the defendants, and thereafter, made and filed its findings of fact and conclusions of law, which said findings of fact and conclusions of law so made by the Court and filed by the Clerk are hereby made a part hereof by reference as fully and completely as though they were set out in haec verba. [95]

Wherefore, by reason of the law and the premises, and the findings of fact and conclusions of law of the Court as aforesaid, It Is Ordered and Adjudged and This Does Order and Adjudge that the plaintiff above-named, United States of America, do have and recover of and from the defendants above-named, R. E. Lee and Standard Accident Insurance Company, a corporation, the sum of \$6,000.00, together with interest thereon at the rate of six (6%) per cent. per annum from the 3rd day of February, 1938, amounting to \$1,583.00, together with the plaintiff's costs and disbursements necessarily incurred herein and hereby taxed in the sum of \$109.19.

Done and Dated June 27th, 1942.

CHARLES N. PRAY

Judge

[Endorsed]: Ent. and filed, June 27, 1942. [96]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS OF THE UNITED
STATES FOR THE NINTH CIRCUIT

Notice Is Hereby Given that R. E. Lee and Standard Accident Insurance Company, a corporation, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 27th day of June, 1942, and from the whole thereof.

CORETTE & CORETTE
By KENDRICK SMITH

Attorneys for Appellants R.
Lee and Standard Accident
Insurance Company, a cor-
poration.

Address: 619 Hennessy Bldg.
Butte, Montana.

[Endorsed]: Filed Sept. 21, 1942. [98]

[Title of District Court and Cause.]

PROCEEDINGS

Be It Remembered, that the above-entitled action came duly and regularly on for trial at Great Falls, Montana, at ten o'clock in the morning on Monday, December 1, 1941, before the Honorable Charles N. Pray, Judge, sitting without a jury. The plaintiff was represented by R. Lewis Brown and W. D. Murray, Assistant United States Attorneys, and the defendants were represented by John E. Corette, jr., and Kendrick Smith. Thereupon the following proceedings were had and taken and the following evidence, and none other, was introduced:

The Court: Gentlemen, in this case set for trial this morning, United States v. Lee, do you agree that it may be tried to the Court without a jury?

Mr. Brown: Yes, Your Honor.

Mr. Corette: That is agreeable to the defendant, Your Honor.

The Court: Very well. Mr. Brown, have you looked through the complaint and answer to see just what parts you deem will require some proof? They have admitted a great deal in the answer. I think there are some parts there you may have proof on.

Mr. Brown: I talked with Mr. Smith and Mr. Corette; they don't think there is any issue as far as the Government is concerned. In our complaint we have pleaded certain facts [106] and then

pledged certain conclusions. They have admitted the facts, but they have denied the conclusions.

Mr. Corette: Perhaps the one point about which you may inquire—that is as to whether we were going to urge the point that in the answer we deny that a demand for \$6,000 was made on the surety company. In that connection the defendants will admit that a demand for \$6,000 was made upon one Ira L. Quiat, an attorney at law, representing R. E. Lee, by letter, and that a copy of that letter was sent to the surety company involved. As to the conclusions stated in the complaint which we have denied, we, of course, still deny those conclusions. I think the most important one is the denial of an obligation on our part to drill any further wells after having applied for surrender.

Mr. Brown: We offer in evidence Plaintiff's Exhibit No. 1, which is a letter written by Mr. William Zimmerman, jr., Commissioner, to Ira L. Quiat as attorney for Mr. Lee.

Mr. Corette: If the Court please, there is no objection to the admission of this exhibit provided it is understood that Ira L. Quiat represented Mr. Lee.

The Court: That is the reason, I suppose, the letter was sent.

Mr. Brown: This letter, Your Honor, is brief and it is addressed to

“Ira L. Quiat, Esq., Suite 415, Symes Building, Denver, Colorado. My dear Mr. Quiat:

Under date of August 12, 1937, you filed a statement by Mr. R. E. Lee in answer to notice to show cause why an oil and gas mining lease, No. 129, on Blackfeet tribal Indian lands in Montana, should not be canceled and be held liable for the payment of \$6,000, the penalty of the bond, for failure to comply with its drilling requirements. [107]

"The matter was referred to the Blackfeet Tribal Council and the action of the Council was opposed to accepting surrender of the lease and relieving the lessee from the payment of the above mentioned sum. The Department has carefully considered the matter and feels that the wishes of the Indians are reasonable and should be followed. The lease was accordingly canceled January 20 and Mr. Lee and his surety were held liable for the payment of the full amount of the bond and for the proper conditioning of the leased premises. As attorney for the lessee, you are accordingly notified that he will be allowed 30 days from date of this letter within which to pay \$6,000 to the Superintendent of the Blackfeet Indian Agency, Browning, Montana, and properly to condition the leased premises, or show cause why suit should not be brought to collect the said amount and for any additional sum that may be determined properly to be due the Indians for failure properly to plug and abandon the wells on the

leased premises or otherwise properly condition the premises.

"A copy of this letter is being sent to the Standard Accident Insurance Company, surety on Mr. Lee's bond, for its information and as notice in the premises and for such action as it may care to take in the matter.

Sincerely yours,

WILLIAM ZIMMERMAN, JR.
Commissioner.

Copy to Standard Accident Insurance Co.,
Detroit, Mich.

Copy, with copy of letter approved 1-20-38 to
Supt., Blackfeet Agency.

1-cv-25

Copy to R. E. Lee, Cut Bank, Montana.
Carbon for Indian Office." [108]

Mr. Brown: We rest, Your Honor.

Mr. Corette: If the Court please, perhaps we can save some time by putting in all the exhibits first and having them read.

The Court: Very well.

Mr. Corette: If the Court please, we now offer in evidence Defendant's Exhibit No. 2, which is a letter dated December 4, 1936, from R. E. Lee to The Secretary of Interior, asking consent to surrender of the oil and gas lease involved. The exhibit was obtained from the United States Attorney.

Mr. Brown: We object to it, if the Court please, as hearsay, a self-serving declaration, incompetent, irrelevant, and immaterial for any purpose in this lawsuit.

The Court: It may be received subject to the objection.

Mr. Corette: As I understand it, there is no objection to the form—it is a certified copy?

Mr. Brown: No.

(Defendant's Exhibit No. 2, admitted in evidence and read to the Court by Mr. Corette, is in words and figures as follows:) [109]

“Received Dec. 18 1936 U. S. Geological Survey Casper, Wyoming.

“Received Dec. 21, 1936 Blackfeet Agency.

“Office of Indian Affairs received Mar 1 1937.

—12831

“Cut Bank, Montana.
December 4, 1936.

“To The Secretary of Interior, U. S. A.
Washington, D. C.

Att: Mr. T. A. Walters, First Assistant
Secretary of Interior

Dear Sir:

Regarding: Oil and Gas Lease #129
Cont-I-5-ind 7023 of January 24, 1936.

Above lease to R. E. Lee of Cut Bank, Montana, covering 470 acres located as follows:

E $\frac{1}{2}$ E $\frac{1}{2}$ E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 27,
T. 33N, R. 6W,
SW $\frac{1}{4}$, W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ Sec. 26, T.
33N., R. 6W,
W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 25, T. 33N, R. 6W,
all in Glacier County, Montana.

In June 1936 R. E. Lee completed one well as a dry hole, drilled into Madison Lime and abandoned in accordance with terms of lease. This well located in center of W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 25, T. 33N, R. 6W.

R. E. Lee then participated in the drilling of a well on adjoining land to the above described lease. This well was located in center of SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 26, T. 33N, R. 6W, and was a direct offset to above described lease and important in proving the further desirability in drilling above described lease. This well was completed as a dry hole in October 1936, drilled into Madison Lime and abandoned in accordance with regulations of Government leases.

Other developments on lands adjoining the above described lease such as a dry hole in Section 2, T. 32N, R. 6W, and a dry hole in SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of Sec. 1, T. 32N, R. 6W, all point to the improbability of obtaining oil or gas production by further development or drilling on the above described lease.

R. E. Lee, Therefore, requests cancellation of this lease, cancellation or release of bond,

and release from all liability under bond, and requests this consideration on account of: [110]

"1. Having in good faith and strictly under terms of the lease completed part of the development required which proved unsuccessful.

2. And other developments on adjoining lands being unsuccessful and discouraging further development expense on this lease.

Yours very truly,
/s/ R. E. LEE"

Mr. Corette: We now offer Defendant's Exhibit No. 3 in evidence.

Mr. Brown: Objected to, if the Court please, as being incompetent, irrelevant, and immaterial, of no evidentiary value, and being simply the expression of an opinion of one in the Department of the Interior subordinate to the Secretary, in no manner controls the action of the Secretary.

The Court: It may be received subject to the objection. I don't know who this supervisor here is—what his duties were..

Mr. Corette: I thought we would prove that later on.

The Court: Very well.

Mr. Corette: Do I understand there is no objection to the form of these exhibits we are putting in, that they are photostatic copies, or certified copies?

Mr. Brown: That is the one that came to me from Washington, D. C. in response to the demand,

is the best we can get. I don't have any objection to its form.

Mr. Corette: We would like to say we appreciate the courtesies extended by the United States Attorney in furnishing whatever documents we have demanded from him, and to say that is the source of most of these documents. Has the Court read this exhibit?

The Court: Yes. It is received subject to objection.

(Defendant's Exhibit No. 3 received in evidence is in words and figures as follows:) [111]

DEFENDANT'S EXHIBIT No. 3

("Copy)

UNITED STATES
DEPARTMENT OF THE INTERIOR
GEOLOGICAL SURVEY
305 Federal Bldg.,
Casper, Wyoming.

December 19, 1936.

Office of Indian Affairs received Jan 13 1937.

2417

"Mr. C. L. Graves, Superintendent,
Blackfeet Indian Agency,
Browning, Montana,

Subject: Oil and Gas Lease No. 129.

Dear Sir:

"I am enclosing herewith three copies of an application prepared by R. E. Lee of Cut Bank,

Montana, requesting cancellation of oil and gas lease No. 129, contract 1-5-ind. 7023. This lease was approved January 24, 1936.

"One well has been drilled on the above lease in the SW Section 25, T. 33N., R. 6W., Cut Bank field, without finding any production above the Madison lime, or 100 feet into the Madison lime as required by the lease terms. The lease, under the Special terms approved by the Tribal Council, provides for the drilling of four wells on the premises within one year from the date of approval. I cannot justify any requirement for the additional three wells in view of the dry hole drilled on the lease, and the dry hole drilled in the SW NE Section 26, T. 33 N., R. 6 W.

"It is therefore recommended that the request for cancelation be accepted and the fee of \$1.00 be deposited to the credit of the Tribe. Will you kindly advise this office the date of cancelation, in order to clear our records? Form 9-614 and a check for \$1.00 are attached hereto.

"Very truly yours,
(Sgd) H. J. DUNCAN
Supervisor.

"Enclosure

cc Washington

Shelby

File

HJD VG

"Copy to Bureau of Indian Affairs." [112]

Mr. Corette: Mr. Brown, may it be stipulated between counsel that Mr. H. J. Duncan, who wrote Defendant's Exhibit No. 3, is the Supervisor of the United States Geological Survey at the territorial or district office of that organization in Casper, Wyoming, and that office has charge of the territory including Glacier County and the land involved in this lawsuit.

Mr. Brown: It is so stipulated.

The Court: Very well.

Mr. Corette: Defendants now offer in evidence Defendant's Exhibits Nos. 4 and 5, which are the original receipts showing the payment in full of the bonus due at the time the lease involved was originally issued, and the advance royalty or annual rental due during the entire first year that the lease was in existence, that is the first year from the date of the approval of the lease by the Secretary of the Interior.

Mr. Brown: Objected to as entirely immaterial. There is no question under the pleadings that the defendant owed anything for royalty or rental. That is not in issue at all. I don't see the purpose of it.

Mr. Corette: I might say that the sole purpose is that as the defendant reads paragraph seven of the lease, they are entitled to ask the Secretary to cancel the lease only when the lease is in good standing, and at a time when they owe nothing under the lease.

Mr. Brown: We concede any payment of rental.

There is no delinquency in that respect. There is no issue on that at all.

The Court: Well, it may be received subject to the objection. [113]

(Defendant's Exhibit No. 4 received in evidence subject to objection, is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 4

"United States
Department of the Interior
Office of Indian Affairs
5-652 O. R. No. 188188
No. 188188

OFFICIAL RECEIPT

Received of Georg H. Campbell, c/o Mont. Power & Gas Co., Cut Bank, Montana, Sixty-five and no/100#### Dollars.

Description of Exchange: Pd. by Cashier's Check #17018 dated 9/25/35, on the First Nat. Bank of Browning, Montana.

(For Money Orders, Drafts, Checks, and other negotiable paper, give Description, Including Date, Number, Etc.)

Bill No.	For What	Quantity	Unit	Funds to be Unit	Price	Amount Charged
Remit- tance, if not in cash, is accepted subject to collec- tion of exchange.	Payment of 20% of the Bonus bid on Tracts 1 and 2 as advertised for auction bid to be sold September 25, 1935. Deposited pending further developments. No Contract as yet.			65 00	Spec. Dep.	
				Total Carried,	65 00	lww

(Use Plain Letter-Size Paper for Extra Sheets, Citing Official Receipt Number on Each Sheet.)

Date—September 26, 1935.

Unit—Blackfeet Agency, Browning, Montana.

WARREN L. O'HARA

Special Disbursing Agent

By

Disbursing Officer.

/s/ J. H. BROTT

Deputy Disbursing Agent.

No. 188188

Original"

[114]

(Defendant's Exhibit No. 5 received in evidence subject to objection, is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 5

"United States
Department of the Interior
Office of Indian Affairs

5-652 O. R. No. 249705
 No. 249705

OFFICIAL RECEIPT

Received of R. E. Lee, Cut Bank, Montana, Seven Hundred Forty and no/100### Dollars.

Description of Exchange: Pd. by Cashier's Check No. 33, dated 12/2/35, on the Bank of Glacier County, Cut Bank, Mont.

(For Money Orders, Drafts, Checks, and other negotiable paper, give Description, Including Date, Number, Etc.)

Bill No.	For What	Quantity	Unit Price	Funds to be Charged
Remit-tance if not in cash, is accepted to collection of exchange.	Payment of the balance of the Bonus due on oil and gas lease numbered 129, the advance royalty or annual rental & the lease fee on same. No Contract on this lease pending approval.		740 00	Spec. Dep.

Total Carried, 740 00 lvw

(Use Plain Letter-Size Paper for Extra Sheets, Citing Official Receipt Number on Each Sheet.)

Date—December 9, 1935.

Unit—Blackfeet Agency, Browning, Montana.

WARREN L. O'HARA

Special Disbursing Agent

By _____

Disbursing Officer.

/s/ H. M. KNUTSON

Deputy Disbursing Officer.

No. 249705

Original''

[115]

Mr. Corette: Defendants now offer in evidence Defendant's Exhibit No. 6, which is the receipt for the \$1 surrender fee paid by R. E. Lee at the time he applied for the surrender.

Mr. Brown: Objected to as immaterial, without the issues.

The Court: It may be received subject to objection. [116]

(Defendant's Exhibit No. 6 received in evidence subject to objection, is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 6

"United States
Department of the Interior
Office of Indian Affairs

5-652 O. R. 340971
 No. 340970

OFFICIAL RECEIPT

Received of R. E. Lee by the American Iron & Metal Co., Cut Bank, Montana, One and no/100#### Dollars.

Description of Exchange: Pd. by Ck. #11494 dated 12/19/36, on the Casper Nat. Bank of Casper, Wyoming.

(For Money Orders, Drafts, Checks, and other negotiable paper, give Description, Including Date, Number, Etc.)

Bill No.	For What	Quantity	Unit Price	Funds to be Charged
Remit-	Funds to cover the tancee, if not in cash, is accepted subject to collec- tion of exchange.			
	Funds to cover the cancelation fee in the event cancela- tion is granted of oil and gas lease No. 129, approved by the Department under date of Jan- uary 24, 1936, and assigned contract n u m b e r I-5-ind- 7 0 2 3. Deposited pending final action of the Department on the application for cancellation.		1 00	Spec. Dep.
	Total Carried,			1 00 29-lvw

(Use Plain Letter-Size Paper for Extra Sheets, Citing Official Receipt Number on Each Sheet.)

Date—January 18, 1937.

Unit—Blackfeet Agency, Montana.

/s/ H. M. KNUTSON

Deputy Disbursing Officer.

No. 340970

Original"

[117]

Mr. Corette: Perhaps the next point can be better covered by stipulation between counsel then by introduction of this voluminous document. I have in my hand a certified copy of the regulations governing the leasing of Tribal lands for mining purposes, approved by Hubert Work, Secretary of the Interior, on July 23, 1924. I would like to have in the record and to have the Court take judicial notice of Article 27 of these regulations which relate to cancelation and surrender. We understand, through information obtained from the Department of the Interior and from Mr. Peden, the District Engineer of the United States Geological Survey, that these are the rules and regulations which were in effect during the years 1935, 1936, and 1937, and during all of the period involved in this action. Can it be stipulated, Mr. Brown, Section 27 of these regulations are the rules and regulations of the Department of the Interior regarding leasing of Tribal lands for mining and oil and gas, and that Section 27 reads as set forth in the pamphlet?

Mr. Brown: So far as I know, they are. I don't

have any knowledge otherwise and of course the Court takes judicial notice of them. However, at this time, it is not an objection, but I do want to state my position, that the lease itself contains a provision, and in my opinion relief from the obligations as the Secretary of the Interior sees fit, imposed by the lease, and if it is contended that the regulation in that particular pamphlet are any different from the provisions of the lease itself, why then our contention is that the lease itself controls to that extent the particular regulation. That is no objection, but just a statement.

The Court: Yes. Well, it may be received to be considered by the Court later. [118]

(Defendant's Exhibit No. 7 admitted in evidence and read to the Court by Mr. Corette is in words and figures as follows, to-wit:)

"27. A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated. When the lessee applies for cancellation of an approved lease he shall pay a surrender fee of \$1, and all royalties and rents due to the date of completion of such application must be paid before the same will be considered, and the parts of the lease held by the lessor and the lessee shall be surrendered, together with a properly executed and recorded release of

record if the lease has been recorded. No part of any advance royalties shall be refunded to the lessee, nor shall he be relieved from his obligation to pay advance royalties and rentals in lieu of development annually when due by reason of any subsequent surrender or cancellation of the lease. Upon Cancellation of a lease the lessor shall be entitled to take immediate possession of the land."

Mr. Corette: I might say that the only part of the regulation 27 which we believe adds anything to Section 7 of the lease, or which in any way affects this case, is the first two lines, which read: "A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee." Mr. Brown, for the convenience of the Court, can it be agreed by all concerned that this is a Tribal lease?

Mr. Brown: It is a lease of Tribal lands on the reservation. Does that answer your question? It is a lease of Tribal lands on the reservation. [119]

Mr. Corette: Defendants now offer in evidence Defendant's Exhibit No. 8, which is the formal notice of intent to abandon well, filed by R. E. Lee with the Department of the Interior Geological Survey. It is the original signed by Mr. Lee and Mr. Peden.

Mr. Brown: Objected to as immaterial, has no evidentiary value in the case.

The Court: Well, it seems to me there isn't any

point made in the pleading on it, but I will receive it subject to objection so that we will have the connecting story of the whole theory of the case. [120]

(Defendant's Exhibit No. 8 admitted in evidence subject to objection and read to the Court by Mr. Corette, is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 8

"Department of the Interior
Geological Survey

R. E. Lee
Tribal No. 129
Serial Number.....
Lease.....
Received Jun. 6, 1936
U. S. Geological Survey
Shelby, Montana

SUNDRY NOTICES AND REPORTS ON WELLS

Notice of Intention to Drill	Subsequent Record of Shooting
Notice of Intention to Change Plans	Record of Perforat- ing Casing
Notice of Date for Test of Water Shut-off	Notice of Intention to Pull or Otherwise Alter Casing
Report on Result of Test of Water Shut-off	Notice of Intention to Abandon Well x
Notice of Intention to Re-drill or Repair Well	Subsequent Report of Abandonment
Notice of Intention to Shoot	Supplementary Well History

(Indicate above by check mark nature of report, notice,
or other data)

June 4, 1936

Following is a notice of intention to do work on land under lease described as follows:

(State or Territory) Montana.

(County or Subdivision) Glacier.

(Field) Cut Bank.

Well No. 1.

($\frac{1}{4}$ Sec. and Se. No.) SW 25.

(Twp.) 33 N.

(Range) R 6 W.

(Meridian) M.M.

The Well is located 1845 ft. (*M*) of S line and 330 ft. (*E*) of W line of sec. 25.

The elevation of the derrick floor above sea level is 3631 ft. [121]

“DETAILS OF PLAN OF WORK

(State names of and expected depths to objective sands; show sizes, weights, and lengths of proposed casings; indicate mudding jobs, cementing points, and all other important proposed work.)

Will mud Madison Limestone from bottom of hole to 3146. Will plug top of Madison with lead wool, shutting off water, then cement basal Ellis with 8 to 10 sacks cement. Will bridge hole below Cut Bank sand at approximately 3080 feet, then cement hole to above Sunburst sand at approximately 2840 feet. Will attempt to recover 2000' of $8\frac{1}{4}$ " casing which was cemented with 50 sacks of cement at 2535' to shut

off water found in sand at 2420-45, and then mud to surface leaving suitable marker at location. Surface pipe was set at 636 feet and cemented to surface.

Approved June 6, 1936.

Company R. E. LEE

By /s/ R. E. LEE

Title: Lessee.

Address: Cut Bank, Montana.

/s/ W. M. PEDEN

Title: District Engineer, Geological Survey.

Address: Shelby, Montana.

Note:—Reports on this form to be submitted in triplicate to the Supervisor for approval.” [122]

Mr. Corette: Defendants now offer in evidence Defendant's Exhibit No. 9, which is a formal report of the subsequent report of abandonment of the well.

Mr. Brown: We object to it, if the Court please, as being immaterial for any purpose in the action.

The Court: The same ruling. [123]

(Defendant's Exhibit No. 9 admitted in evidence subject to objection, is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 9

"Department of the Interior
Geological Survey

U. S. land office.....
R. E. Lee
Serial Number.....
Tribal No. 129
Lease or Permit.....

Received Sep. 2, 1936
U. S. Geological Survey
Shelby, Montana

SUNDRY NOTICES AND REPORTS ON WELLS

Notice of Intention to Drill	Subsequent Record of Shooting
Notice of Intention to Change Plans	Record of Perforating Casing
Notice of Date for Test of Water	Notice of Intention to Pull or Otherwise Alter Casing
Shut-off	Notice of Intention to Abandon Well
Report on Result of Test of Water	Subsequent Report of Abandonment
Shut-off	Supplementary Well History
Notice of Intention to Re-drill or Repair Well	
Notice of Intention to Shoot	

(Indicate above by check mark nature of report, notice,
or other data)

August 31, 1936

Following is a report of work done on land
under lease described as follows:

(State or Territory) Montana.

(County of Subdivision) Glacier.

(Field) Cut Bank.

Well No. 1.

($\frac{1}{4}$ Sec. and Sec. No.) SW25.

(Twp.) 33 N.

(Range) R 6 W.

(Meridian) M. M.

The Well is located 1845 ft. (N) of S line and 330 ft. (E) of W line of Sec. 25.

The elevation of the derrick floor above sea level is 3631 ft. [124]

“DETAILS OF PLAN OF WORK

(State names of and expected depths to objective sands; show sizes, weights, and lengths of proposed casings; indicate mudding jobs, cementing points, and all other important proposed work.)

Muddled and bridged back from 3238-3145. Plugged Top Madison from 3145-35 with 450 lbs. of Lead Wool and 8 sacks cement; shut off sulphur water. Bridged hole at 2976 (base of Cut Bank) and cemented with 54 sacks to cover both Cut Bank and Sunburst sands. Pulled 2000' of $8\frac{1}{4}$ " casing which was cemented at 2535 with 50 sacks to shut off water from sand at 2420-45. Muddled to surface. 636' of $10\frac{3}{4}$ " casing left in hole, was cemented to surface with 200 sacks. Cleaned up location, left suitable marker.

Approved Sept. 2, 1936.

Company R. E. LEE

By /s/ R. E. LEE

Title: Lessee.

Address: Cut Bank, Montana.

/s/ D. M. PEDEN

W. M. PEDEN

Title: District Engineer, Geological Survey.

Address: Shelby, Montana.

Note:—Reports on this form to be submitted in
triplicate to the Supervisor for approval.

Government Printing Office 6—7053”

(The reverse side of Defendant's Exhibit No.
9 is as follows:)

“Subscribed and Sworn to before me this
2 day of September, 1936.

/s/ J. R. WELLES

Notary Public for the State of Montana. Re-
siding at Cut Bank, Montana. My Com-
mission expires March 31, 1939.

[Notarial Seal]” [125]

Mr. Corette: If the Court please, we now offer
in evidence Defendant's Exhibit No. 10, and I think
I should make a brief statement as to what this is.
The third exhibit to the complaint is a letter dated
July 9, to R. E. Lee. It is a letter which required
R. E. Lee to show cause why the oil and gas lease
involved should not be canceled. This is a dup-

licate original of the statement filed by R. E. Lee in answer to that letter, attempting to show cause why the lease should not be canceled. We do not have here the original; that went to the Secretary of the Interior, but the exhibit introduced by the Plaintiff this morning, namely the letter—I think it is dated February 3, 1938—to Ira L. Quiat acknowledges receipt of this document. Consequently we now offer in evidence Defendant's Exhibit No. 10.

Mr. Brown: We object to it as hearsay, if the Court please, and as being immaterial and a self-serving declaration. It served its purpose before the Secretary, and the Secretary having exercised the discretion that the contract permitted him to exercise, it is of no evidentiary value here.

The Court: It may be received subject to objection.

Mr. Corette: This is an important document and I think it should be read to the Court.

The Court: Very well.

(Defendant's Exhibit No. 10 admitted in evidence subject to objection and read to the Court by Mr. Corette, is in words and figures as follows:)

DEFENDANT'S EXHIBIT No. 10

"Hon. Harold L. Ickes,
Secretary of the Interior,
Washington, D. C.

Dear Sir:

Blackfeet Tribal Lease No. 129
and Allotted No. 137 [126]

"On September 25, 1935, at a Public Auction held at the Blackfeet Agency, Browning, Montana, Mr. Geo. H. Campbell was the successful bidder on Tract 1 consisting of the E $\frac{1}{2}$ E $\frac{1}{2}$ E $\frac{1}{2}$ W $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 27, E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 27, SW $\frac{1}{4}$ Sec. 26, T 35 N, R 6 W, containing 250 acres and Tract 2 consisting of the W $\frac{1}{2}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ Sec. 26, W $\frac{1}{2}$ W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 25, T 33 N, R 6 W, containing 220 acres.

"Mr. R. E. Lee negotiated with Mr. Campbell for the two tracts before the lease was drawn and the lease was then drawn as one lease in the name of R. E. Lee.

"A Bond for the sum of \$6,000.00 was obtained by Mr. Lee from the Standard Accident Insurance Co. with Fred Goodstein and the American Iron and Metal Company of Denver, Colorado, as indemnitors.

"On December 9, 1935, the executed Lease and Bond together with a cashier's check for \$740.00 to cover the remainder due on the bonus and the advance annual rental were de-

livered to Mr. O'Hara, Supt. of the Blackfeet Agency.

"Mr. Lee was advised by letter on February 4, 1936, that his lease had been approved as Tribal Lease No. 129 by the Secretary of the Interior as of January 24, 1936.

"Prior to the approval of the lease by the Secretary, Mr. Lee had successfully negotiated with Mr. Fred Goodstein and the American Iron and Metal Company of Denver, Colorado, for the full development of the lease according to the terms of the lease.

"Unusually bad weather prevented Mr. Goodstein and the American Iron and Metal Company from beginning immediate development work but as soon as it was possible a well was begun in the center of the W $\frac{1}{2}$ NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 25, T 33 N, R 6 W. This location was chosen as being the highest structural position on the lease. [127]

"The well was spudded on March 25, 1936, and diligently drilled in a good workmanlike manner into the upper Cut Bank sand. The upper Cut Bank sand was found at 2900 feet and was 80 feet thick. It was very hard with practically no porosity. Only a slight show of oil was found at 2970 feet.

"The lower Cut Bank sand, which is the main producing horizon in the Cut Bank field, was not present.

"Every effort was made to make a commer-

cial well of the small showing found at 2970 feet by shooting, but they were unsuccessful.

"As soon as it was realized that a commercial well could not be obtained from the small showing in the upper Cut Bank sand, the well was deepened through the very cavy Ellis shale to the top of the Madison lime at 3140 feet where sulphur water was encountered. The well was drilled 100 feet into the Madison limestone as required by the provisions of the lease at great expense because of the water and cavy nature of the Ellis shale.

"The well was then plugged and abandoned according to the regulations and under the supervision of the United States Geological Survey.

"A very difficult and expensive fishing job during the deepening of the well from the upper Cut Bank sand into the Madison limestone resulted in a cost of approximately \$25,000 for the drilling and abandoning of the well.

"Prior to the drilling of the R. E. Lee Tribal 129 No. 1, twelve wells had been drilled to the Madison limestone in the Cut Bank field, none of them found oil and all of them found sulphur water.

"Approximately \$8,000.00 of the total cost of the well was spent to comply with the terms of the lease after it was known that a commercial well could not be obtained. [128]

"Under ordinary field practice a non-commer-

cial well can be abandoned for approximately \$500.00

“During the drilling of the R. E. Lee Tribal 129 No. 1 well, Mr. Lee and associates had obtained at a public sale at Browning, Montana, Allotted Lease No. 137 immediately adjacent to Tribal 129 on the North and to obtain more geological data regarding Lease No. 129, Mr. Fred Goodstein and the American Iron and Metal Company participated in the drilling of a well offsetting Lease No. 129 as shown on the enclosed plat.

“The R. E. Lee Allotted 137 Well No. 1 was drilled 100 feet into the Madison Lime without finding the Cut Bank sand present and finding sulphur water in the Madison Limestone. The cost of this well was approximately the same as for the well on Tribal No. 129.

“This well was plugged and abandoned according to the regulation and under the direction of the United States Geological Survey.

“Subsequent to the drilling of the two R. E. Lee wells, there has been three other wells completed to the South and South and East of the R. E. Lee Tribal No. 129 which have been dry and abandoned, all of them finding the Cut Bank sand very poorly developed or entirely absent.

“These wells have been drilled over a structural range covering the entire Lee Leases.

“It is the opinion of geologists who are fa-

miliar with the entire development of the Cut Bank field that there is practically no chance for commercial production on either of the Lee Leases.

"Prior to negotiations for Tribal Lease No. 129, Mr. Lee discussed the operating regulations and nature of the Bond required with members of the United States Geological Survey.

"He was informed that the Bond required was for the protection of the lease to see that proper drilling, casing and abandonment procedure were followed. He was also informed that should a dry [129] hole be completed on one of the leases and he did not feel justified in further development that he could ask for cancellation of his lease without penalty to himself.

"Quoting from the Notice of Sale of Oil and Gas Leases dated at Browning, Montana, August 30, 1935, which advertised Tract 1 and 2 of which Tribal Lease No. 129 is composed: 'The lessee will not be required to furnish any special bond but the usual bond prescribed by the regulations of the Secretary of the Interior must be filed.'

"Quoting from Oil and Gas Mining Lease issued to R. E. Lee on Tribal No. 129—Sec. 7: 'The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein

and the further sum of One Dollar and have this lease cancelled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder, provided, that if this lease has been recorded, lessee shall execute a release and record the same in the proper recording office.'

"The Lessee, R. E. Lee, through Fred Goodstein and the American Iron and Metal Company, completed a dry hole that was carried to the depth prescribed in the terms of the lease, and was abandoned under the supervision of the U. S. Geological Survey.

"The lessee participated in the drilling of a well the prescribed depth into the Madison limestone which disproved production on Allotted Lease No. 137 and also further disproved commercial production on Tribal Lease No. 129.

"The lessee and his associates, Mr. Fred Goodstein and the American Iron and Metal Company, did not think there was sufficient chance to find commercial production on either lease to warrant the expenditure of additional money and asked to be released from further [130] obligation without penalty on December 4, 1936.

"Should the Commissioner of Indian Affairs continue to ask for payment on the Bond after a dry hole has been drilled on the lease for failure to drill other dry holes, it will have a

very detrimental effect on future sales of Indian lands in the Cut Bank field. No prudent operator would obligate himself to drill where there is no release except by forfeiture of his Bond should his first venture be unsuccessful.

"In view of the above facts, we feel that we are entitled to have this lease cancelled without penalty.

"Yours very truly
"/s/ R. E. LEE"

Mr. Corette: We might say that any reference in here to allotted lease No. 137 should be stricken because that lease is not involved in this action. Is that agreeable, Mr. Brown?

Mr. Brown: That is agreeable.

Mr. Corette: And that the document should be amended by eliminating any reference to Allotted Lease No. 137. Defendants now offer in evidence Defendant's Exhibit No. 11, which is a certified and photostated copy of a letter to the Secretary of the Interior from the Assistant Commissioner of Indian Affairs.

Mr. Brown: We object to this as being immaterial for any purpose, if the Court please.

The Court: Same ruling—may be received subject to objection. [131]

(Defendant's Exhibit No. 11 admitted in evidence subject to objection and read to the Court

by Mr. Corette is in words and figures as follows, to-wit:)

DEFENDANT'S EXHIBIT No. 11

"Refer in Reply
to the Following:

L-O&G
67908-35
64951-37

Address Only the
Commissioner of Indian Affairs

United States
Department of the Interior
Office of Indian Affairs
Washington

Nov. 17, 1937

"The Honorable
The Secretary of the Interior

My dear Mr. Secretary:

"Reference is had to Office letter of May 29, wherein recommendation was made to the Secretary that Blackfeet tribal oil and gas mining lease No. 129, in favor of R. E. Lee be cancelled at the request of the lessee and that he be relieved of liability under a bond given to secure performance of the lease. The First Assistant Secretary deemed it inadvisable to approve the recommendation and returned the letter with his memorandum of June 19, pointing out therein that the lessee had failed to

fulfill the obligations contained in Section 4 of the lease requiring the drilling of four wells on the premises during the first year of the lease; and that under the provisions contained in said Section 4, the lessee was liable for the full amount of the bond because of failure to drill the wells. The letter of May 29, and the memorandum of June 19, are included in the attached file with the lease.

"As suggested in the memorandum the matter of terminating liability on the bond was submitted to the Blackfeet Tribal Council. At a meeting held August 9, the council passed a resolution asking that the lease be cancelled for failure to comply with the drilling requirements; and that the amount of the bond be forfeited. There was submitted to the council copy of a letter dated August 12, from the lessee's attorney, setting forth that the area included in the lease had been adequately tested by the drilling of one well on the leased premises and the drilling of another well on adjoining allotted land also held by the lessee under lease No. 137. Other dry holes have been drilled on lands in adjoining sections. See sketch included in the attached file showing relative location of the tracts and the wells drilled thereon.

"As stated in Office letter of May 29, the Director and the local field officer of the Geological Survey are of the opinion that the lands included in both the tribal and the allotted lease have been adequately tested. [132]

"It is the contention of the attorney for the lessee that the bond given in this case is one for indemnity only; and that there has been no loss to the Blackfeet Indians under the lease; and hence there can be no recovery on the bond. The attorney for the lessee also states that it would be inequitable to hold the lessee for the amount of the bond, and under Section 7 of the lease the Secretary of the Interior may accept the surrender of the lease, and thus relieve the hardship that would result if the bond were forfeited. While he does not definitely so state the lessee apparently believes that under said Section 7 he has the right to surrender the lease at any time during the first year after developing the premises to the extent that it is definitely shown that oil or gas cannot be found in paying quantities. Said Section 7 provides for surrender of the lease "with the consent of the Secretary of the Interior" providing all amounts then due are paid in addition to the surrender fee.

"In view of the provisions of the lease contract and the wishes of the Blackfeet Tribal Council, it is recommended that the lease be cancelled and that the amount of the bond be forfeited for the benefit of the Blackfeet Indians.

"The Tribal Council has requested that the lands be readvertised for lease for oil and gas mining. It is believed that this phase of the

matter should be deferred pending receipt of recommendation from the Superintendent.

"The matter of cancelling allotted lease No. 137 also held by R. E. Lee will be deferred pending final action in the instant case.

Sincerely yours,

/s/ WILLIAM ZIMMERMAN, JR.

Assistant Commissioner.

Approved, Lease Cancelled and lessee and his surety held for the full amount of the bond and the proper conditioning of the leased premises: Jan. 20, 1938.

/s/ OSCAR L. CHAPMAN

Assistant Secretary.

Enclosure No. 1403078" [133]

R. E. LEE

called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Corette:

Q. State your name, please.

A. Robert E. Lee.

Q. Where do you live, Mr. Lee?

A. At Cut Bank, Montana.

Q. What is your age? A. Thirty-four.

Q. Are you the Lee who obtained Oil and Gas Tribal Lease No. 129 which has been introduced in evidence in this case? A. Yes.

(Testimony of R. E. Lee.)

Q. Would you please tell the Court whether or not you drilled a well on Oil and Gas Lease No. 129.

A. Yes, I did.

Q. When did you start the drilling of that well?

A. In the latter part of March, 1936.

Q. In what month did you complete the drilling of that well?

A. The early part of June, 1936.

Q. Do you know what the approximate cost of the drilling of that well was?

A. Approximately \$25,000.

Q. Was the well a producing well, or a dry hole?

A. The well was a dry hole.

Q. I now show you, Mr. Lee, Defendant's Exhibit No. 2, and ask you if that is a photostat copy of a letter addressed to the Secretary of the Interior on December 4, 1936, by you? A. Yes, it was.

Q. Is the signature appearing at the end of the letter a photostat of your signature? [134]

A. Yes, it is.

Q. Did you send this letter to the Secretary of the Interior? A. Yes.

Q. Do you remember, Mr. Lee, whether you sent this letter directly to the Secretary of the Interior, or whether you first delivered it to Mr. Duncan, the Supervisor of the U. S. G. S.?

A. Let me see it again, please. This letter, I believe, was sent to Mr. Duncan.

Q. I now, Mr. Lee, show you Defendant's Exhibit No. 10, and ask you to look at the last page and tell the Court whether that is your signature.

(Testimony of R. E. Lee.)

A. Yes, it is.

Q. Is Defendant's Exhibit No. 10 a duplicate original of your office copy of the statement which was delivered to the Secretary of the Interior on your behalf in answer to the letter of July 9, 1937, which is in evidence as having been received by you? A. Yes, it is.

Q. Was this Defendant's Exhibit No. 10 presented to the Secretary of the Interior on your behalf? A. Yes, it was.

Q. Did you during the summer and fall of the year 1936 have a geologist make a study of the area involved in this lease and the adjacent area in order to determine the probabilities of producing oil and gas in that territory?

Mr. Brown: Objected to as being incompetent, irrelevant, and immaterial; not within any of the issues of the pleadings; has no evidentiary value; and any study of any geologist can in no way tend to vary the written terms the Government sues on here.

The Court: Well, taking into account the answer, your theory [135] of the case, what do you intend to show—that this geologist made a report to the Secretary of the Interior?

Mr. Corette: That a geologist made a report to Lee, which is the bases of his statement to the Secretary of the Interior. The answer in the third affirmative defense alleged the exact question that I now have asked Mr. Lee—the probabilities of producing oil and gas in this area—which information

(Testimony of R. E. Lee.)

he used at the time that he filed his application for surrender, dated December 4th.

The Court: I will permit you to briefly cover that and see whether his report was based upon the report of his geologist.

Q. Did you in the summer and fall of 1936 have a geologist make a study and report on the probabilities of producing oil and gas from Tribal Lease No. 129? A. Yes, I did.

Q. Was that report completed and given to you prior to the time that you prepared and filed Defendant's Exhibit No. 2, which is the letter of December 4, 1936, to the Secretary of the Interior?

A. Yes.

Q. Who was the geologist that made that report?

Mr. Brown: If the Court please, in order to save time and not interrupt, may it be understood that I object to this entire line of evidence upon the grounds I have already stated?

The Court: Very well, that may be understood.

A. Mr. J. E. Hupp of Cut Bank.

Q. Was that report one of the reasons why you filed your letter dated December 4th, which is Defendant's Exhibit No. 2? A. Yes.

Q. What was the nature of that report? [136]

A. It was very unfavorable.

Q. And what was the nature of it as to whether there was any reasonable probability, or whether or not there is any reasonable probability of producing oil and gas on the land involved?

(Testimony of R. E. Lee.)

A. Geologically, there was no chance of getting commercial production.

Q. Was that the contents of the report which was made to you? A. Yes.

Q. At the time that you filed with the Secretary of the Interior the application for consent to surrender, contained in Defendant's Exhibit No. 2, had you paid all of the rentals and bonuses required under that lease? A. Yes, I had.

Q. Was there anything at that moment which you were obliged to do under the lease which you had not done?

Mr. Brown: Objected to as calling for the witness' conclusion.

The Court: Yes, sustained.

Mr. Corette: We will withdraw the question. Mr. Lee, did you also on or about December 4, 1936, and at the time that you applied for surrender of this lease, surrender the lease?

A. Yes, applied for permission to surrender.

Q. That is, you filed this application with the Government? A. Yes.

Q. At the same time did you surrender the lease? A. Yes.

Q. At the same time did you abandon the property? A. Yes.

Q. And move off the property all of your equipment? A. Yes.

Q. Was this lease ever recorded, Mr. Lee? [137]

A. No.

Q. By not being recorded, you mean that it was

(Testimony of R. E. Lee.)

not placed on record in Glacier County, Montana?

A. That is right, yes.

Mr. Corette: That is all, Mr. Brown.

Cross Examination

By Mr. Brown:

Q. Mr. Lee, in September, 1935, you entered into a lease with the United States of certain land on the Blackfeet Indian Reservation. You know that, do you? A. Yes.

Q. Now before you entered into the lease, did you have any geologist go over the land and advise you as to what prospects you had of getting gas or oil there? A. Yes.

Q. You had that? A. Yes.

Q. You entered into the lease then with the view of the knowledge or information that you gained from the geologist you employed? A. Yes.

Mr. Brown: That is all.

Mr. Corette: That is all.

J. E. HUPP

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Corette

Q. State your name, please.

A. J. E. Hupp.

(Testimony of J. E. Hupp.)

Q. What is your residence, Mr. Hupp.

A. Cut Bank, Montana.

Q. How long have you lived at Cut Bank?

A. About ten and a half years. [138]

Q. What is your occupation or profession?

A. Oil geologist.

Q. How long have you been engaged in this profession of oil geologist?

A. About nineteen years.

Q. What education did you have as an oil and gas geologist?

A. Graduate of the University of Colorado, geologist; B. A. degree in geology.

Q. When you say "oil" does that include gas as well as oil? A. Yes, sir.

Q. What experience have you had in your profession as oil geologist, and in what localities?

Mr. Brown: We admit the witness' qualifications as a geologist.

Mr. Corette: I think as to the Cut Bank area, we would like to show what knowledge he has of special wells there. As to his general qualifications, then that is all right.

The Court: Very well.

Q. Please tell the court, Mr. Hupp, exactly what experience you have had in connection with the oil and gas wells and oil that is discovered—production, in the Cut Bank oil and gas.

A. I was present when the first well was drilled in the Cut Bank gas field, and I was present when

(Testimony of J. E. Hupp.)

practically the first 150 wells were drilled. Studied the cuttings and samples and I have studied most of the interesting wells since that time. I have lived in that area continuously for ten and a half years.

Q. Have you practiced your profession in that area ever since the Cut Bank field was first discovered? A. Yes, sir.

Q. Have you studied the results of every well of any consequence that has been drilled in the Cut Bank field? [139] A. Yes.

Q. What experience have you had, or what knowledge do you have of the well which was drilled on Oil and Gas Tribal Lease No. 129?

A. I studied the sample on it from the beginning. I was geologist on that well for Mr. Lee.

Q. As geologist on that well for Mr. Lee, were you present during most of the time the well was being drilled? A. Yes, sir.

Q. Were you present at the time the well was drilled in? A. Yes, sir.

Q. Did you study the well as it was being drilled, of the structures through which it was being drilled? A. Yes.

Q. What connection did you have with the well which was drilled on Allotted Indian Lease No. 137?

Mr. Brown: If the Court please, we object to any further testimony on the ground it is incompetent, irrelevant, and immaterial; that its only purpose is to vary the terms of the written instru-

(Testimony of J. E. Hupp.)

ment, and that it is not competent for that purpose.

Mr. Corette: He is the geologist.

The Court: Objection is as to all the evidence. It may be received over the objection.

A. I was geologist on that well.

Q. On well lease No. 137? A. Yes, sir.

Q. What familiarity did you have with each and every other well which was drilled in the vicinity of Tribal Lease No. 129?

A. I studied the results of all of them.

Q. And did you in the summer and fall of 1936, make a geological study and report for R. E. Lee to determine whether in your [140] opinion there was any reasonable probability of producing oil and gas from Tribal Lease No. 129? A. I did.

Q. And during what period of time did you make that study?

A. I originally made a study for Mr. Lee before he purchased the land, and during the time the wells were drilled, I continuously studied that area and studied the surface out-crops and all surface data that was available.

Q. Did you advise Mr. Lee of your conclusions?

A. I did.

Q. Do you recall when that was that you advised Mr. Lee of your conclusions?

A. It was after the completion of the well on allotted 137.

(Testimony of J. E. Hupp.)

Q. Do you recall approximately what month that was during the year 1936?

A. It was in November, I think, I gave him my report.

Q. I now show you Defendant's Exhibit No. 2, dated December 4, 1936, to the Secretary of the Interior, and ask you if you aided Mr. Lee in the preparation of that document? A. I did.

Q. At that time had you advised Mr. Lee as to your opinion regarding whether oil and gas could be produced from land described in the document?

A. I had.

Q. And what was your opinion, Mr. Hupp, as to whether there was any reasonable probability of producing oil and gas from the land involved in Lease No. 129?

A. I advised that I thought there was no chance for him to find oil in commercial quantities.

Q. I now show you Defendant's Exhibit No. 10 and ask you if you [141] also aided Mr. Lee in the preparation of that document? A. I did.

Q. What have you to say as to whether the statements contained in Defendant's Exhibit No. 10 are true?

A. To the best of my knowledge, they are.

Q. Have you read it over? A. Yes, sir.

Q. Tell the Court whether or not the statements contained in Defendant's Exhibit No. 10 are matters which were within your knowledge at the time that the exhibit was prepared—the document was prepared? A. They were.

(Testimony of J. E. Hupp.)

Q. You say that they were true at that time?

A. Yes, sir.

Q. What is your present opinion, Mr. Hupp, as to whether there is any reasonable probability of obtaining production from the lands contained in Lease No. 129?

A. I think my opinion is just the same as it was then. There has been no development that shows that it would be any more favorable.

Q. Mr. Hupp, I now show you Defendant's Exhibit No. 12, and I will ask you if that is a map prepared by you? A. It is.

Q. Is it a map which shows the location of the land covered by Tribal Lease No. 129 and the surrounding lands? A. It is.

Q. Does it correctly show the location of the various lands in that locality? A. It does.

Q. Does it also correctly show the location of certain wells [142] and dry holes which have been drilled in that locality? A. It does.

Q. Was it prepared by you? A. Yes, sir.

Mr. Corette: We now offer in evidence Defendant's Exhibit No. 12.

Mr. Brown: Make the same objection, that it is immaterial for any purpose.

The Court: May be received subject to objection.

(Defendant's Exhibit No. 12 received in evidence subject to objection, is a map.)

(Testimony of J. E. Hupp.)

Q. Now, Mr. Hupp, referring to the land on Defendant's Exhibit No. 12 which is colored in green, please tell the Court what that land is?

A. That's Tribal Lease No. 129, R. E. Lee.

Q. That is the Lee involved in this action?

A. Yes.

Q. And the land just North of the land colored in green, which is marked R. E. Lee, Al. 137, tell the Court what that is.

A. That is an allotted lease Mr. Lee had.

Q. Do you have a colored pencil with you of any kind? A. Yes, sir.

Q. I wonder if you would draw a circle around the wells drilled on lease 129 and the other dry holes drilled in that area which you studied, made your geological study.

(Witness indicated various points on the map.)

Q. Mr. Hupp, you have now drawn a red circle around twelve spots which are marked on Defendant's Exhibit No. 12. Tell the Court what those circles represent.

A. They are circles around dry holes in this area; wells that were drilled non-productive. [143]

Q. On Defendant's Exhibit No. 12, does the little black circle with the cross inside of it, which appears inside of each red circle, indicate a dry hole? A. It does.

Q. Tell the Court which, if any, of those dry holes were drilled prior to December 4, 1936?

(Testimony of J. E. Hupp.)

A. I think all but one of them.

Q. Which one was drilled after that?

A. I believe this well was drilled after that.

(indicating)

Q. That is the well marked No. 3 on "TR. 121," Section 36? A. Yes, sir.

Q. Tell the Court what this heavy red line is which appears in the Southeast portion of the map, and in the Northeast portion of the map—what it represents.

A. It represents what I consider the area, or a border, between productive territory and non-productive.

Q. And which side of the red line do you consider productive territory, and which side do you consider non-productive territory?

A. On the left-hand side of the lower red line, and on the right-hand side of the upper red line.

Q. In order to have that clarified for the record, do I understand you correctly to mean that all of the land shown on the map which is West of the lower red line and in Section 26-35 to 34-27 is non-productive area? A. I think it is.

Q. Is it your opinion that the area which appears near the Easterly or right-hand edge of the map as you look at it in Sections 1 and 36 is productive area?

A. It is poorly productive. There isn't a commercial lease. [144] The element hasn't shown a commercial lease represented on that map in that area.

(Testimony of J. E. Hupp.)

Q. But the land to the West of the red line has been entirely non-productive?

A. That is right.

Q. From the *geological which* you have made, is it your opinion that this area to the West or left of the line is non-productive? A. Yes.

Q. Referring to the red line in the upper right hand corner of the Northeast corner of the map. What is that red line?

A. There is a little production in that area to the West of that red line, but it isn't commercial.

Q. To the West and North of the red line in the upper right-hand corner of the map. Now referring to the area between the two red lines in Sections 24, 25, and 26. What have you to say as to whether that land is productive or not?

A. I don't think it is productive.

Q. Tell the Court what you mean when you say it is or is not productive insofar as the presence of producing sands in that area are concerned.

A. In the Cut Bank field the main producing is what they call lower Cut Bank. It is a very distinctive sand, coarse, black chert sand, and in some areas we have what we call Ellis Island, which are places here in Ellis formation, which lies at Cut Bank sand; was an island in the seas at the lower Cut Bank sand; was deposited and where these islands occurred, there would be no deposit of lower Cut Bank and sand. It is my opinion in this area that at the time of the deposition of the lower Cut

(Testimony of J. E. Hupp.)

Bank sand this was an island, and that there was no lower Cut Bank sand deposited there. [145]

Q. This area shown on the map West of the red line was Ellis Island at the lower cut bank sand and you say there was no lower cut bank sand deposited in that area. A. That is right.

Q. That is why you believe there is no production in that area? A. That is right.

Q. Is that information rather definitely ascertainable from the drilling which has been carried on in the area?

A. Everything indicates that, yes sir.

Q. Tell us what the lines between the letter "A" and "A" prime, and the line between the letter "B" and "B" prime indicate?

A. They are connections between wells which I have used to bring about cross-sections of that area showing sand conditions.

Q. Mr. Hupp, I now refer to Defendant's Exhibit No. 13 and ask you if that is a cross-section, and which you have said you prepared?

A. I did.

Q. And also to Defendant's Exhibit No. 14, and ask you if that is also one of the cross-sections to which you have referred? A. It is.

Q. Which cross-section is it that refers to line "A" to "A" prime appearing on Exhibit No. 12?

A. The top one.

Q. The Defendant's Exhibit 13 is the cross-section of the area located underneath the line "A" to "A" prime? A. That is right.

(Testimony of J. E. Hupp.)

Q. And is Defendant's Exhibit No. 14 the cross-section of the structures located beneath the ground along the line "B" to "B" prime?

A. That is right. [146]

Q. Do those cross-sections show the comparative elevation above sea level of the various structures which you have found in the drilling of the wells appearing in the various cross-sections?

A. It shows elevation above sea level, the different formations.

Q. What are the formations referred to on the cross-section?

A. The bottom formation, the Madison Lime.

Q. That is the dark formation is the Madison Lime stone?

A. This is Madison Lime in here. (indicating)

Q. The Madison Lime is the black-like looking formation below the gray formation and at the very bottom of Defendant's Exhibits Nos. 13 and 14? A. Yes, sir.

Q. What is the grayish formation above the Madison Lime stone? A. Ellis Shale.

Q. That is the gray formation to which I am now referring. The orange formation which appears above the Ellis Shale, what is that?

A. Upper cut bank sand.

Q. The reddish formation appearing above the upper cut bank sand?

A. That is varigated shale break between the upper cut bank sand and the Sunburst sand.

(Testimony of J. E. Hupp.)

Q. And what is the yellow colored formation appearing at the top? A. The Sunburst sand.

Q. Now referring to Defendant's Exhibit No. 13. Tell the Court whether it shows the Cross-section of the Patterson-Cole No. 1 well, which is located on Defendant's Exhibit No. 12?

A. It does. It is this well here. (indicating)

Q. Is the Patterson-Cole well the well in Section 2 in the piece of land "Phil I. Cole?" [147]

A. It is.

Q. Does Defendant's Exhibit No. 13 also show a cross-section of R. E. Lee No. 1 well on Tribal Lease 129? A. It does.

Q. And that is the well located near the West line of Section 25? A. That is right.

Q. Does it also show the Cross-section of the R. E. Lee No. 1 well on Allotted Indian Lease 137?

A. It does.

Q. That is the well appearing on Defendant's Exhibit No. 12 near the middle of Section 26?

A. That is right.

Q. Does it also show the same thing for the Texas Company, Lennon No. 1 well?

A. That is right.

Q. Where is the Texas Company-Lennon No. 1?

A. Located in Section 24.

Q. Now referring to Defendant's Exhibit No. 14. Does it show a cross-section of the R. E. Lee allotted well No. 137?

A. It does. This one here. (indicating)

(Testimony of J. E. Hupp.)

Q. That is the same well near in the section of 26 which is referred to on Defendant's Exhibit No. 13? A. That is right.

Q. Does Defendant's Exhibit No. 14 then also show a cross-section of the Lee No. 1 Well on Tribal 129? A. It does.

Q. That is the well which is involved in the action here? A. That is right.

Q. Does it show the same type of cross-section for the Sauter-Tweedy No. 2 well? [148]

A. It does.

Q. The Sauter-Tweedy No. 2 well is located in the Southwesterly part of Section 25?

A. That is right.

Q. It is Easterly of the red line on Defendant's Exhibit No. 12? A. That is right.

Q. Being Easterly it is in what you consider the poor producing area? A. That is right.

Q. Does Defendant's Exhibit No. 14 also show a cross-section of the Par Oil Company, Tweedy No. 2 well? A. That is right.

Q. Where is that located, the Par Oil, Tweedy No. 2 well? Is it located in the Northeast of Section 36? A. That is right.

Q. Is it in the poor producing area to which you referred? A. That is right.

Q. Do Defendant's Exhibits Nos. 13 and 14 correctly show the cross-sections and the various wells which they represent? A. Yes, sir.

Q. And in your opinion do they correctly show

(Testimony of J. E. Hupp.)

the structures, underground structures which exist in those wells?

A. They show above sea level and the formation encountered.

Q. Do they show the depths of those formations?

A. No, they don't.

Q. Can the depth of the formation be measured by reading the above sea level figures which appear on the left side of the exhibit, and comparing those to the formation?

A. No, the depth if you had the surface——

Q. I mean the distance from the top or bottom of each formation? [149]

A. Oh, yes, it does show that.

Q. That is by looking at Defendant's Exhibit No. 14 or No. 13, and looking at the numbers appearing on the left-hand side, and then looking at the length of the yellow coloring, you can determine how much upper cut bank there was in the well?

A. Approximately.

Mr. Corette: We offer in evidence Defendant's Exhibits Nos. 13 and 14.

Mr. Brown: Objected to as immaterial, without the issues, of no evidentiary value.

The Court: The same ruling, received subject to objection.

(Defendant's Exhibits Nos. 13 and 14 received in evidence subject to objection, are cross-sections.”)

(Testimony of J. E. Hupp.)

Q. For the information of the Court and of the people here, tell us how far below the surface the Sunburst sand is found on the wells appearing on Defendant's Exhibits Nos. 13 and 14.

A. I can't tell from the cross-section how far below the surface they are.

Q. Just approximately?

A. Well, between twenty-seven and twenty-eight hundred feet.

Q. These cross-sections do not attempt to show the various formations above the Sunburst sand?

A. That is right.

Q. Now referring to Defendant's Exhibit No. 13, tell the Court whether there is any lower cut bank sand shown on the wells appearing on Defendant's Exhibit No. 13.

A. There is no lower cut bank sand present.

Q. Tell the Court whether that indicates an absence of the lower cut bank sand in the area referred to on Defendant's Exhibit No. 12 by the line "A" to "A" prime? [150] A. That is right.

Q. By indicating an absence of the cut bank sand, does it indicate an absence of any producing sand in that area? A. It does.

Q. Referring to Defendant's Exhibit No. 14. Tell the Court what the exhibit shows regarding the presence of lower cut bank sand?

A. It shows on Tweedy No. 2, Par Oil, Tweedy No. 2, that there was lower cut bank sand present developing in that area.

(Testimony of J. E. Hupp.)

Q. Do I understand that you mean that Defendant's Exhibit No. 14 shows some lower cut bank sand in the Sauter-Tweedy No. 2 well, and the Par Oil Company-Tweedy No. 2 well?

A. That is right.

Q. Now are those wells shown on Defendant's Exhibit No. 12 to the East of the red line?

A. They are.

Q. Are they in what you described as poorly producing area? A. That is right.

Q. Tell the Court whether the lower cut bank sand as shown by your cross-section disappears entirely where the line "B" to "B" prime crosses the red line on Defendant's Exhibit No. 12?

A. That is right.

Q. Is any lower cut bank sand found from the point "B" on Defendant's Exhibit No. 12 to the red line which appears near the Easterly edge of the exhibit? A. No.

Q. In your opinion do these cross-sections which you have prepared along lines "A" to "A" prime, and "B" to "B" prime clearly indicate whether the lower cut bank or producing sand is present under the land included in Tribal Lease No. 129?

[151]

A. They indicate that it isn't present.

Q. That it isn't present under the land included in Tribal Lease No. 129? A. That is right.

Q. Does that indicate whether any production could be expected from the land included in Tribal Lease No. 129?

(Testimony of J. E. Hupp.)

A. That indicates that, yes sir.

Q. Now Defendant's Exhibit No. 10 states that there was sent with it to the Secretary of the Interior a plat showing the location of the various wells or dry holes. Did you prepare that plat?

A. I did.

Q. Do you have any copy of it?

A. No, I have no copy.

Q. Tell the Court whether that plat showed the relative location of the R. E. Lee Tribal Lease No. 129, and the other dry holes which have been lettered?

A. It shows approximately the same area that this map does.

Q. And did it show the same wells which appear on this map? A. Yes, sir.

Q. Insofar as they had been drilled at that time? A. Yes.

Mr. Corette: We offer Exhibit No. 12 in evidence.

Mr. Brown: Objected to as incompetent, irrelevant, and immaterial for any purpose.

The Court: Same ruling.

(Defendant's Exhibit No. 12 admitted in evidence subject to objection, is a map.)

Q. What have you to say as to whether the well which appears on Defendant's Exhibits Nos. 12, 13, and 14 has been given an adequate test of the entire structural area contained in [152] Tribal Lease No. 129?

(Testimony of J. E. Hupp.)

A. I think they have.

Q. Please tell the Court whether the well on Tribal Lease No. 129 on which you were geologist, whether the drilling and abandonment was supervised by a representative of the United States Geological Survey? A. It was.

Q. Did he represent the Department of the Interior? A. Yes, sir.

Q. Was that Mr. Peden, who is sitting here?

A. I think at the time we drilled that well Mr. Haseider was there most of the time.

Q. Is he one of Mr. Peden's assistants?

A. Yes, sir.

Q. And a geologist for the United States Geological Survey?

A. He is Assistant District Engineer.

A Voice: He is associate engineer.

Q. Please tell the Court, Mr. Hupp, whether the well which was drilled on the land covered by Tribal Lease No. 129 was located at the most desirable point from the standpoint of the possibility of producing oil and gas?

A. It was as far as we are able, it was the best location we could pick.

Q. Why do you consider that the best location for a well on Tribal Lease No. 129?

A. It is the highest structural position and the nearest to known presence of lower cut bank sand.

Q. Tell the Court whether, from a time standpoint, it would have been possible to drill three

(Testimony of J. E. Hupp.)

more wells on Tribal Lease No. 129 between December 4, 1936, the date of the application for surrender, [153] and January 24, 1937, which would have been one year from the date that Tribal Lease No. 129 was approved by the Secretary of the Interior?

Mr. Brown: Objected to as immaterial, an attempt to vary the issues of the case as made by the pleadings, the undisputed fact being that three wells weren't there at that time.

Mr. Corette: I thought it was immaterial until it came up in the pre-trial conference.

The Court: I suppose you want to put that in as having some bearing on the strength of the lease, the standing of the lease, at the time. It may go in subject to objection.

A. After we drilled the second well, the well on R. E. Lee, the 137, the requirements to drill to the Madison Lime were eliminated, that in the time of drilling the well, quite a bit—I would say with reasonable luck in all, we could drill three wells easily in that length of time.

Q. In the period between December 4, 1936, and January 24, 1937.

Mr. Corette: That is all.

Cross Examination

By Mr. Brown:

Q. How long does it take to drill a well?

A. They have been drilled by cable tools in

(Testimony of J. E. Hupp.)

about twenty days. That is through cut bank sand.

Q. How long did it take to drill the well that was drilled? A. Seventy-one days.

Q. Were you using equipment that was standard equipment, or ordinarily used in that section of the country, in drilling that well?

A. Well, it wasn't too good. The equipment, the derrick was pretty light, and in case the rig was pulled—I would say with good standard tools it could be easily drilled in [154] thirty-five days.

Q. With the equipment and tools, how long would it take?

A. They had lots of good contractors that were available to drill wells there.

Q. But my question is with the equipment and tools, how long would it take to drill a well?

A. I would say anywhere from twenty days to four months. Never can tell, not with *those* equipment.

Q. You have placed some red circles on the map. What are they?

A. The circles around—symbol of dry hole been drilled in that area.

Q. Now you have one just to the North of Section 26. How far is that from the boundary of the section? Is your map drawn to scale?

A. Yes, sir.

Q. Well you come and tell me how far this dry hole is from that R. E. Lee plot?

A. I can't tell you exactly. It is less than six hundred feet. I can tell you that, but that is all.

(Testimony of J. E. Hupp.)

Q. That is as close as you can come. It is an estimate that it is less than six hundred feet?

A. That is without scale, yes, sir.

Q. Now how far is this one that you have indicated with a letter "A" that is next to the Texas Co., how far is that from that section.

The Court: What do you mean? From the dry hole on 26?

Q. This ground, how far is this hole from that ground there?

A. About three-quarters of a mile—about that.

Q. That is as accurately as you can tell us?

A. Without scaling it. [155]

Mr. Corette: Do you have a scale?

The Witness: No, I haven't.

Mr. Corette: Could you use this ruler?

The Witness: I can tell approximately. (measuring) About a mile.

Q. (By Mr. Brown) In Section 2 you have another one indicated. How far is that from this leased land that R. E. Lee had?

A. About a mile and a half.

Q. Now are there any producing wells in the vicinity of the R. E. Lee land?

A. Closest one is about a quarter of a mile.

Q. How many producing wells are there in that vicinity?

A. Well, it shows twelve on the map, I think. It shows there on the map.

Q. It shows twelve producing wells on the map?

(Testimony of J. E. Hupp.)

A. Yes, sir.

Q. What distance are they from this R. E. Lee land; R. E. Lee had leased?

A. All the way from a mile and a half to a quarter of a mile.

Q. They vary from a quarter of a mile to a mile and a half, is that it? A. Yes, sir.

Q. They are equally as close as the dry holes you have indicated there, are they not?

A. Not as the dry hole on the lease.

Q. That is the one *hold* on the lease?

A. There is another one next to it.

Q. Drilled on that lease?

A. No, just off the edge of it.

Q. With the equipment that Lee had, on the leased land, how long [156] would it take to drill a well one hundred feet into the Madison Lime stone?

A. Well, it would depend. It varies at different places.

Q. Well, depend on what?

A. Would depend on the condition of your water, what kind of pipe you had in the hole—a lot of conditions.

Q. In other words, you can't answer that question? A. No.

Mr. Brown: That is all.

(Testimony of J. E. Hupp.)

Redirect Examination

By Mr. Corette:

Q. Mr. Hupp, tell the Court what delays were incurred which required the sevety-one days to drill the well on Tribal Lease No. 129.

A. The chief one was a fishing job. They lost their tools and they had to fish them out.

Q. Was there, or was there not any delay in connection with the decision on the question of whether the United States Geological Survey would require the drilling of the well into the Madison Lime?

Mr. Brown: Objected to as entirely immaterial; the lease speaks for itself.

The Court: Sustain the objection.

Q. Can you tell us, Mr. Hupp, why the well drilled on Tribal Lease No. 129 cost as much as \$25,000.00? A. Why it cost as much?

Q. Yes.

A. Well, they encountered water, for one thing, around twenty-five hundred feet; had to run a string of casings there and cement it in, and when they abandoned the well, they couldn't recover the casings; they also had cemented the surface casings clear to the surface. There was no recovery price there. [157] In drilling, after they shot this well, in an endeavor to make a commercial well out of it, why they developed lots of cavy chunks to fall in, which resulted in this expensive fishing

(Testimony of J. E. Hupp.)

job; and encountering the water in the top of the Madison Lime caused Ellis shale to cave and you had to fight that cave in drilling any deeper.

Q. Does the distance from the R. E. Lee Tribal Lease No. 129 lands to any producing well have any bearing on the possibility of production if the lower cut bank sand pinches out between the two points?

A. The whole area as indicated is very poor area. There isn't a lease on that map that is commercial, that has even commenced to pay back the money put in it.

Mr. Corette: If the Court pleases, the defendants rest, and for the purpose of the record, we would like to make a motion.

The Court: Any rebuttal?

Mr. Brown: We rest. No rebuttal.

Mr. Corette: Comes now the defendants, and each of them, at the close of all the evidence in the case and moves the Court for a dismissal of the case and for judgment for and on behalf of the defendants and against the plaintiff in the case on the following grounds and for the following reasons: First, the *the* lease contains paragraph 7, which provides as follows: "7. The *less* may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as pro-

vided herein and the further sum of one dollar and have this lease canceled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder; Provided, This if this lease has been recorded, lessee shall [158] execute a release and record the same in the proper recording office."

Second, that the lease contains paragraph 8, which provides as follows: "8. This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental or acreage, unless agreed to by both parties."

Third, That Regulation 27 of the regulations covering the leasing of tribal lands for mining purposes, approved by the Secretary of the Interior, reads in part, and insofar as pertinent, as follows: "A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee."

Fourth, That Lee, at a time when the lease was in good standing, surrendered the lease and applied to the Secretary of the Interior for consent to surrender in the manner provided in paragraph 7 of the lease and Article 27 of the Regulations, and did all things necessary to obtain the Secretary's consent to surrender, and complied with every requirement of paragraph 7 of the lease, Article 27 of the regulations, and the entire lease.

Fifth, That Regulation 27 provides that a lease will be canceled by the Secretary of the Interior for good cause upon application of the lessee, and that Lee presented good cause to the Secretary of the Interior for cancellation, and for consent to surrender, for which he had applied, by showing that the area had been tested and proven non-productive, and [159] by showing that there was no reasonable probability of obtaining production from the area included in the lease; and by showing that further drilling on the land involved would be useless and an economic waste and not justified; and by showing that he had complied with all of the provisions of the lease with which he had to comply up to the time that he surrendered the lease and applied to the Secretary of the Interior for consent to that surrender; and by showing that he had done everything necessary and taken all steps necessary to surrender the lease, and to obtain the Secretary of the Interior's consent to surrender.

Sixth, That there were no facts to justify the Secretary of the Interior's refusal to consent to the surrender of the lease by Lee.

Seventh, That the Secretary of the Interior's refusal to consent to the surrender was arbitrary, unreasonable, unsupported by any facts, contrary to law.

Eighth, That there is no evidence of any damage to the plaintiff or anyone else in this case, and there is no basis for the plaintiff's claim for \$6,000,

and the plaintiff is attempting to enforce a penalty which is unreasonable, illegal, and contrary to law.

The Court: Very well, it will be taken under advisement. I suppose you will renew your motion?

Mr. Brown: We renew our motion for judgment in accordance with the allegations of the pleadings.

Mr. Corette: May we have a period of time within which to file a brief?

The Court: Yes, I think perhaps you will want to have a transcript of the testimony written up. Upon receipt of the transcript, how much time do you desire—thirty days? [160]

Mr. Corette: That would be ample.

The Court: Thirty days on the side, thirty days to reply—we will make it thirty days all around—thirty on the side upon receipt of the transcript. Gentlemen, don't make these briefs any longer than you feel is absolutely necessary, because you know I have other things to do.

Mr. Corette: Do we file our briefs simultaneously?

Mr. Brown: We expect to file our brief first.

The Court: Yes, you file your brief first, then you have thirty days after receipt, and they will have thirty days to reply. [161]

[Endorsed]: Filed Sept. 22, 1942.

[Title of District Court and Cause.]

**DESIGNATION OF CONTENTS OF
RECORD ON APPEAL**

Appellants, R. E. Lee and Standard Accident Insurance Company, a corporation, defendants above named, hereby and herewith designate the contents of the record on appeal in the above entitled matter as follows:

The complete record and all the proceedings and all the evidence in the above entitled matter.

Filed herewith are two copies of the reporter's transcript of the evidence included in this designation.

Dated this 22nd day of September, 1942.

CORETTE & CORETTE
By KENDRICK SMITH

Attorneys for Appellants, R.
E. Lee and Standard Accident Insurance Company, a
corporation.

Address: 619 Hennessy Bldg.,
Butte, Montana.

Service of the foregoing Designation of Contents of Record on Appeal acknowledged this 22nd day of September, 1942.

W. D. MURRAY

Assistant Attorney of the
United States, in and for
the District of Montana.

[Endorsed]: Filed Sept. 22, 1942. [163]

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF
ORIGINAL EXHIBITS

Upon application of counsel for R. E. Lee and Standard Accident Insurance Company, a corporation, appellants herein, and it appearing to the Court that Exhibits numbers 12, 13 and 14 received in evidence at the trial of the cause should, by reason of their form and contents, be sent to the appellate court in lieu of copies under Rule 75, section (i) of the Rules of Civil Procedure,

It Is Hereby Ordered that such original Exhibits numbers 12, 13 and 14 be by the Clerk of this Court duly certified to the United States Circuit Court of Appeals for the Ninth Circuit and transmitted to the said Clerk of the Circuit Court of Appeals by mail with the record on appeal in said cause, said Exhibits to be *turned* to the Clerk of this Court after the final disposition of said appeal according to the practice of the Clerk of said Circuit Court of Appeals.

Dated this 26th day of September, 1942.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed and entered Sept. 28, 1942.

[165]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 166 pages, numbered consecutively from 1 to 166 inclusive, constitutes a full, true and correct transcript of all portions of the record in Case Number 150, United States of America versus R. E. Lee, et al, designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith, as a part of the record on appeal, original exhibits Numbers 12, 13 and 14, which were offered and received in evidence at the trial of said cause.

I further certify that the costs of said transcript amount to the sum of Thirty-two and 50/100 (\$32.50) Dollars, and have been paid by the appellants.

Witness my hand and the seal of said Court at

Great Falls, Montana, this 22nd day of October,
A. D. 1942.

[Seal] C. R. GARLOW,
 Clerk as aforesaid,
By C. G. KEGEL
 Deputy Clerk [166]

[Endorsed]: No. 10293. United States Circuit Court of Appeals for the Ninth Circuit. R. E. Lee and Standard Accident and Insurance Company, a corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed October 26, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10293

R. E. LEE and STANDARD ACCIDENT IN-
SURANCE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF CONTENTS OF REC-
ORD ON APPEAL, SUBDIVISION 6 OF
RULE 19 (C.C.A.)

STATEMENT OF POINTS ON APPEAL

Appellants and Defendants, R. E. Lee and Standard Accident Insurance Company, hereby specify the following points upon which they intend to rely on the appeal in the above-entitled matter:

1. That the Court committed error in refusing and denying Defendants' Motion for Judgment, made at the time of trial, for each and every reason and point specified therein. (T. pp. 158-160).
2. That the evidence was insufficient to justify the Judgment against these Defendants and Appellants, or either of them, and that the said Judgment was contrary to the evidence. (T. pp. 95-96).

3. That the evidence was insufficient to justify the Findings by the Court as set forth in Findings of Fact numbered VI, VII, VIII and IX, (T. pp. 79-80) and that said Findings, and each of said Findings, were against the clear weight of the evidence and were clearly erroneous.

4. That the evidence was insufficient to justify the Court in concluding as it did in Conclusions of Law numbered II and III (T. pp 80-81), and that said conclusions, and each of them, were contrary to and against the clear weight of the evidence and were clearly erroneous.

5. That there was credible evidence to support, and no evidence of any kind to disprove, Defendants' Proposed Findings of Fact numbered VI, VII, VIII, IX, X, XI, XII, XIII and XIV, and each of them, and that the Court was in error in refusing to adopt said Proposed Findings of Fact, and each of them. (T. pp. 87-90).

6. That the Court was in error in refusing to adopt Defendants' Proposed Conclusions of Law numbered II, III, IV and V, and each of them. (T. pp. 90).

7. That the Court erred in rendering its opinion in favor of the United States of America, Appellee and Plaintiff. (T. pp. 92-93).

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellants, R. E. Lee and Standard Accident Insurance Company, a corporation, hereby designate under Subdivision 6 of Rule 19 (C.C.A.) the following portions of the certified typewritten Transcript of Record in the above-entitled cause on file herein to be contained in the printed record on the appeal of said Appellants:

1. Names and addresses of attorneys of record. (T. p. 1).
2. The Complaint. (T. pp. 3-18).
3. The Answer of R. E. Lee and Standard Accident Insurance Company. (T. pp. 31-42).
4. Plaintiff's Motion for Judgment on the Pleadings. (T. pp. 46-48).
5. Defendants' Cross Motion for Judgment on the Pleadings. (T. pp. 50-51).
6. Order Denying Motions for Judgment on the Pleadings. (T. p. 58).
7. Defendants' Motion to Amend Answer. (T. pp. 64-70).
8. The complete record of all proceedings and evidence at the trial. (T. pp. 75, 105-161).
9. Order of Transmission of Original Exhibits. (T. p. 165).
10. Defendants' Proposed Findings of Fact and Conclusions of Law. (T. pp. 83-90).
11. Opinion of the Court. (T. pp. 92-93).
12. Findings of Fact and Conclusions of Law by the Court. (T. pp. 77-81).

13. The Judgment. (T. pp. 95-96).
14. Notice of Appeal filed by Appellants and Defendants, R. E. Lee and Standard Accident Insurance Company. (T. p. 98).
15. Designation of Contents of Record on Appeal. (T. p. 163).
16. Clerk's Certificate to Transcript of Record on Appeal. (T. p. 166).
17. Designation of Contents of Record on Appeal under Rule 19 (C.C.A.).
18. Statement of Points on Appeal under Rule 19 (C.C.A.).

Dated this 22nd day of October, 1942.

CORETTE & CORETTE
By KENDRICK SMITH
619 Hennessy Building
Butte, Montana
Attorneys for Defendants
and Appellants.

Service of the foregoing Statement of Points on Appeal and Designation of Contents of Record on Appeal, Subdivision 6 of Rule 19 (C.C.A.) acknowledged and a copy thereof received this 23 day of October, 1942.

R. LEWIS BROWN
Asst. U. S. Atty.,
Attorney for Plaintiff
and Appellee.

[Endorsed]: Filed Oct. 26, 1942.

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**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

R. E. LEE and STANDARD ACCIDENT AND
INSURANCE COMPANY, a corporation,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE DIS-
TRICT OF MONTANA.

FILED

DEC 8 1942

PAUL P. O'BRIEN,
CLERK

CORETTE & CORETTE,
JOHN E. CORETTE, JR.,
KENDRICK SMITH,
619 Hennessy Bldg.,
Butte, Montana,
Attorneys for Defendants
and Appellants.

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NO. 10293

**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

R. E. LEE and STANDARD ACCIDENT AND
INSURANCE COMPANY, a corporation,
Appellants,
vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

This is a civil action at law brought by the United States to collect for the alleged breach of one of the conditions of a written lease of lands owned by the United States. The Complaint alleged that the District Court had "jurisdiction hereof by reason of the provisions of section 41 of Title 28, U. S. Code". (R. 2). Appellants agree. The appeal here is from a final money judgment. (R. 77). This is a final decision and review is allowed under the provisions of section 225 of Title 28 U. S. Code, being Judicial Code Section 128 as amended.

STATEMENT OF THE CASE

This case involves the question of whether the defendant Lee surrendered an oil and gas lease in accordance with the provisions of sections 7 and 8 of the lease and section 27 of the regulations and was thereby relieved of any further obligation, or whether the Secretary of the Interior without *any facts* to support his action could refuse to accept the surrender, declare the lessee in default and collect the amount of the bond.

Suit was brought by the United States to collect \$6000 together with interest at 6 per cent per annum from February 3, 1938, for an alleged breach of one of the requirements of a written lease. The individual defendant was the lessee; the corporate defendant being the surety on the bond for performance of the obligations of the lease. The complaint sets forth the lease (R. 9) and the bond (R. 21).

The Complaint alleged that on September 26, 1935, the Superintendent of the Blackfeet Indian Reservation in Montana leased to R. E. Lee certain lands within the reservation and that the lands were owned by the United States and held by it for its Indian wards (R. 3, 4). The lease was an oil and gas lease covering 470 acres (R. 9, 10). Before the lease became effective the lessee had to furnish "a satisfactory bond as required by the regulations." (R. 4). The lease and bond were approved on January 24, 1936 by the Secretary of the Interior and the lease thereupon became effective. (R. 4, 5).

Paragraph numbered 4 of the lease required the

drilling of four wells within the first year and specified that failure to drill such wells would be a violation of a substantial term and condition of the lease and would require payment of the bond (R. 13-15). The Complaint alleged that four wells were not drilled within the first year (R. 6); that paragraph 10 of the lease permitted forfeiture of the lease for a violation of its terms upon thirty days' written notice (R. 18); and that the Secretary of the Interior on February 3, 1938, gave thirty days' demand for the payment of the bond which was not paid. (R. 8).

By answer the defendants admitted the existence and validity of the lease and bond and that Lee, the lessee, did not drill four wells upon the leased premises within one year, but denied that the lease was in full force and effect for the full period of one year and denied that there was any obligation on the part of the lessee to do anything more than to surrender the lease after the drilling on the leased premises and on other premises in the same vicinity indicated that oil or gas could not be produced upon the leased premises. (R. 26-40).

The defendants's third defense was an affirmative defense. Therein it was alleged that within a short time after the lease became effective Lee entered the premises and drilled to completion one well in June of 1936; that this well was not only drilled through the ordinary producing structures but at the request of the United States was drilled to a depth of 100 feet in the Madison limestone, although sulphur water was encountered on entering the Madison limestone,

which indicated that the land would not produce oil or gas in commercial quantities; that the well was drilled at a total cost of approximately \$25,000 and to a depth of 3,238 feet and that all of the operations were carried on under the supervision of the United States Geological Survey (R. 30, 31). The defense also alleged that prior to the completion of the well drilled by Lee on the leased premises five other wells were drilled in the immediate vicinity and that these wells were all dry holes and failed to produce oil or gas in commercial quantities and were abandoned; that the six wells were drilled over a structural range covering all of the lands included in the lease and that the geological information obtained from the drilling of the six wells indicated that oil and gas could not be produced from the lands covered by the lease and that the drilling of further wells would be uneconomical, wasteful and would not produce oil or gas. (R. 31, 32). It is also alleged that Lee had a study made by independent geologists of the probabilities of obtaining production of oil or gas from the leased lands and was informed that there was no reasonable probability of obtaining production of oil or gas and that there was no justification or reason for the drilling of additional wells. (R. 32) Further is was alleged that Lee thereupon, and while the lease was in full force and effect and at a time when he had complied with all the obligations of the lease, took advantage of the provisions of paragraph 7 of the lease and executed and filed with the Secretary of the Interior an application for consent to the sur-

render of the lease and did everything necessary to surrender the lease and to obtain the consent of the Secretary to the surrender and did thereby surrender the lease and relieve himself and his surety company of any further obligation under the lease and under the bond; (R. 32-34) and that the Secretary of the Interior, without having *any facts* of any kind or character upon which to support his action, refused to consent to the surrender (R. 34) and that the action of the Secretary of the Interior was arbitrary, unreasonable and without any facts upon which to base such action, and that the Secretary's action was an abuse of discretion and was contrary to law. (R. 35) It was then alleged that the lease was surrendered in accordance with the provisions of paragraph 7 of the lease and that defendants were relieved of all obligations under the bond. (R. 36)

Thereafter the United States made a motion for judgment on the pleadings (R. 41-43) and defendants filed a cross motion for judgment on the pleadings. (R. 43, 44) The court denied both motions. (R. 45-46)

The defendants made a motion to amend their answer (R. 46-56) to set forth the provisions of paragraph 8 of the lease providing that the lease

"shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease." (R. 47).

The Motion to Amend further set forth paragraph numbered 27 of the regulations in effect at the time

the lease was made, which regulations were approved by the Secretary of the Interior on July 23, 1924, and which regulation numbered 27 provided in part that:

“A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee.” (R. 47).

The Motion alleged that there was full compliance by the lessee with paragraph 27 of the regulations in making application for cancellation. (R. 48, 49, 50-56).

The case was tried to the court without a jury. (R. 80). At the trial there was no conflicting evidence of any kind. The United States contented itself with introducing in evidence it Exhibit No. I, being a letter to an attorney for R. E. Lee, asking for payment of the bond within thirty days (R. 81-83). Thereupon the Government rested. (R. 83).

Thereupon the Defendants proved by uncontradicted evidence:

- (a) That lessee paid a bonus of \$805.00 to the Government in securing the lease. (R. 90-92).
- (b) That one well was drilled upon the leased premises and at a cost of approximately \$25,000.00, of which sum \$8,000.00 was spent to comply with the terms of the lease after it was known that a commercial well could not be obtained (R. 106) and that the well was properly abandoned. (R. 97-102).
- (c) That on an immediately adjacent lease the same lessee participated in the drilling of a well which disproved commercial production on the leased premises. (R. 109).

- (d) That both these wells were dry wells. (R. 109).
- (e) That three other wells in the vicinity were dry wells and that all of the five wells were drilled over a structural range covering the entire lease. (R. 107).
- (f) That geologically there was no chance of getting any commercial production upon the property in this lease. (R. 108).
- (g) That before making application for surrender and cancellation of the lease Lee, the lessee, secured the services of Mr. J. E. Hupp, a geologist who made a study and report on the probabilities of producing oil and gas on the premises and his report showed that geologically there was no chance of getting production. (R. 117-118).
- (h) That paragraph 8 of the lease provided that it

“shall be subject to the regulations of the Secretary of the Interior now or hereafter enforced relative to such leases”.

That regulation 27 of the regulations thereby referred to specified in part:

“A lease will be cancelled for good cause upon application of the lessor or lessee.” (R. 95).

That paragraph 7 of the lease provided that:

“The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part.”

- (i) That application was made by the lessee for surrender and cancellation of the lease on December 4, 1936, and before any default of any kind or character had occurred. Lee, the lessee, addressed a letter to the Secretary of the Interior, delivered the same to Mr. Duncan of the United States Geological

Survey and thereby requested a cancellation of the lease and showed good cause for such cancellation. (R. 84-86, 115).

- (j) That a district Supervisor of the Geological Survey, Mr. H. J. Duncan, stated officially in a letter dated December 19, 1936, to the Superintendent of Blackfeet Indian Agency that he recommended the request of R. E. Lee for cancellation and wrote:

“I cannot justify any requirement for the additional three wells in view of the dry hole drilled on the lease and the dry hole drilled in the SW-NE section 26, T. 33 N., R. 6 W. It is therefore recommended that the request for cancellation be accepted and the fee of \$1.00 be deposited to the credit of the Tribe.”
(R. 87-89).

- (k) That the Director and the local Field Officer of the Geological Survey were “of the opinion that the lands included in both the Tribal and allotted lease have been adequately tested”, and that such opinion was reported to the Secretary of the Interior. (R. 112).

- (l) That thereafter Lee, the lessee, received a letter dated July 9, 1937 (Exhibit “C” to the complaint, R. 24-26) from William Zimmerman, Assistant Commissioner of Indian Affairs in the Department of the Interior, acknowledging prior consideration of the application for cancellation and allowing

“thirty days from date of this letter within which to show cause”

why the lease should not be cancelled and the bond paid. In response to this letter Lee delivered to the Secretary of the Interior a statement reiterating again all of the good causes for an application for surrender. (Defendants’ Exhibit No. 10, R. 104-110).

(m) That J. E. Hupp was a qualified geologist, was present in the Cut Bank field when practically all the first 150 wells were drilled and studied these wells (R. 119-121) and that he had studied the results of any well of any consequence that had been drilled in the Cut Bank field; (R. 121) that on the leased premises he was the geologist on the well which was drilled and in the summer and fall of 1936 made a geological study and report for R. E. Lee and in November of 1936 aided by Mr. Lee in the preparation of Defendants' Exhibit No. 2, a letter dated December 4, 1936, to the Secretary of the Interior, and that at that time advised Mr. Lee that he thought there was no chance for him to find oil in commercial quantities. (R. 122, 123); that the statements contained in Defendants' Exhibit No. 10 were within his knowledge at the time the instrument was prepared and that they were true, this being the subsequent letter to the Secretary of the Interior. (R. 123-124). Mr. Hupp further testified as to a map prepared by him and showing the location of 12 dry holes that were drilled in the area of the leased premises. (R. 125).

At the end of the defendants' case the Government offered no rebuttal. (R. 142).

The defendants thereupon made a motion for judgment specifying the grounds therefor. (R. 142-145). Thereafter the defendants proposed findings of fact and conclusions of law. (R. 64-74). The court rendered its opinion in favor of the United States, (R. 74-76) adopted plaintiff's proposed findings of fact and conclusions of law (R. 58-64) and judgment was entered in accordance therewith. (R. 77-79). This

appeal followed.

The essential question involved is whether the court in view of the uncontradicted evidence should have dismissed the case or rendered judgment for and on behalf of the defendants. This question was raised by the defendants' motion for dismissal and judgment at the close of all the evidence, (R. 142-145) and was renewed in the defendants' proposed findings of fact and conclusions of law. (R. 64-74).

The question is primarily one of law; that is:

- 1st. Whether a lessee can surrender a lease of this kind under sections 7 and 8 of the lease and section 27 of the regulations, when all of the facts which he presents and all of the facts ascertained by the Government in its investigation show good cause for the surrender;
- 2nd. Whether the Secretary of the Interior, without any single fact upon which to base his decision, can refuse to accept the surrender of the lease and declare the lessee in default, even though there was no default at the time of the attempted surrender;
- 3rd. Whether the lessee is entitled to rely upon and act upon section 7 of the lease, which gives him the right to surrender, with the consent of the Secretary, and section 8 of the lease and section 27 of the regulations which specify that "*a lease will be cancelled by the Secretary for good cause*".
- 4th. Whether the Secretary of the Interior may as an administrative officer act arbitrarily and in such manner as no reasonable man could have done;
- 5th. Whether the lessee was excused from further performance, under an implied provi-

sion of the lease, because of the absolute futility of drilling further wells and because the presence of oil and gas was proved not to exist, this being the subject matter of the contract; or

- 6th. Whether in disregard of all these points and questions the Secretary of the Interior has under this lease and its circumstances the unlimited, untrammelled and unfettered power to require payment of the bond for not drilling the four wells, even though all of the facts presented by the lessee and by the Government's representatives support the application for consent to the surrender of the lease, which was made prior to any default by lessee.

SPECIFICATIONS OF ERROR

Appellants and Defendants hereby make the following Specifications of Errors.

I.

The Court erred in refusing and denying Defendants' Motion for Judgment made at the time of trial for the "Fourth" ground stated therein as follows:

"Fourth, That Lee, at a time when the lease was in good standing, surrendered the lease and applied to the Secretary of the Interior for consent to surrender in the manner provided in paragraph 7 of the lease and Article 27 of the Regulations, and did all things necessary to obtain the Secretary's consent to surrender, and complied with every requirement of paragraph 7 of the lease, Article 27 of the regulations, and the entire lease." (R. 143).

II.

The Court erred in refusing and denying Defendants' Motion for Judgment made at the time of trial

for the "Fifth" ground as stated therein as follows:

"Fifth, That Regulation 27 provides that a lease will be canceled by the Secretary of the Interior for good cause upon application of the lessee, and that Lee presented good cause to the Secretary of the Interior for cancelation, and for consent to surrender, for which he had applied, by showing that the area had been tested and proven non-productive, and by showing that there was no reasonable probability of obtaining production from the area included in the lease; and by showing that further drilling on the land involved would be useless and an economic waste and not justified; and by showing that he had complied with all of the provisions of the lease with which he had to comply up to the time that he surrendered the lease and applied to the Secretary of the Interior for consent to that surrender; and by showing that he had done everything necessary and taken all steps necessary to surrender the lease, and to obtain the Secretary of the Interior's consent to surrender." (R. 144).

III.

The Court erred in refusing and denying Defendants' Motion for Judgment made at the time of trial for the "Sixth" ground stated therein as follows:

"Sixth, That there were no facts to justify the Secretary of the Interior's refusal to consent to the surrender of the lease by Lee." (R. 144).

IV.

The court erred in refusing and denying defendants' motion for judgment made at the time of trial for the "Seventh" ground stated therein as follows:

"Seventh, That the Secretary of the Interior's refusal to consent to the surrender was arbitrary, unreasonable, unsupported by any facts, contrary to law." (R. 144).

V.

The court erred in refusing and denying defendants' motion for judgment made at the time of trial for the "Eighth" ground stated therein as follows:

"Eighth, That there is no evidence of any damage to the plaintiff or anyone else in this case, and there is no basis for the plaintiff's claim for \$6,000, and the plaintiff is attempting to enforce a penalty which is unreasonable, illegal, and contrary to law." (R. 144-145).

VI.

The court erred in rendering its opinion in favor of the United States of America, appellee and plaintiff. (R. 74-76).

VII.

The evidence was insufficient to justify the judgment against defendants and appellants or either of them, and the judgment was contrary to the evidence and contrary to law. (R. 77, 80-145).

VIII.

The court erred in making its finding of fact numbered VI that Lee wrongfully failed, refused and neglected to drill the four wells, because the evidence was insufficient to justify such finding and it was clearly erroneous and was an erroneous determination of a mixed question of law and fact. (R. 61-62, 80-145).

IX.

The court erred in making its finding of fact numbered VII that Lee breached the lease by failing to drill four wells within one year, because the evidence was insufficient to justify such finding and it was

clearly erroneous and was an erroneous determination of a mixed question of law and fact. (R. 62, 80-145).

X.

The court erred in making its finding of fact numbered X that generally all facts in issue were found in favor of the plaintiff and against the defendants and that plaintiff had sustained the material allegations of the complaint by competent proof, because the evidence was insufficient to justify such finding and it was clearly erroneous and was an erroneous determination of a mixed question of law and fact. (R. 63, 80-145).

XI.

The court erred in making its conclusion of law numbered II that Lee breached the lease and the Secretary of the Interior acted lawfully in terminating the same and the defendants became liable on the bond, because the evidence was insufficient to justify such conclusion and it was contrary to and against the clear weight of the evidence and was clearly erroneous. (R. 63-64)

XII.

That the court erred in making its conclusion of law numbered III that plaintiff was entitled to judgment, because the evidence was insufficient to justify such conclusion and it was contrary to and against the clear weight of the evidence and was clearly erroneous. (R. 64).

XIII.

There was credible uncontradicted evidence to sup-

port, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered VI and the court was in error in refusing to adopt said proposed finding of fact. (R. 70, 80-145).

XIV.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered VII and the court was in error in refusing to adopt said proposed finding of fact. (R. 70, 72, 80-145).

XV.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered VIII and the court was in error in refusing to adopt said proposed finding of fact. (R. 72, 80-145).

XVI.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered IX and the court was in error in refusing to adopt said proposed finding of fact. (R. 72, 80-145).

XVII.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered X and the court was in error in refusing to adopt said proposed finding of fact. (R. 72, 80-145).

XVIII.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, de-

defendants' proposed finding of fact numbered XI and the court was in error in refusing to adopt said proposed finding of fact. (R. 72, 80-145).

XIX.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered XII and the court was in error in refusing to adopt said proposed finding of fact. (R. 72-73, 80-145).

XX.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered XIII and the court was in error in refusing to adopt said proposed finding of fact. (R. 73, 80-145).

XXI.

There was credible uncontradicted evidence to support, and no evidence of any kind to disprove, defendants' proposed finding of fact numbered XIV and the court was in error in refusing to adopt said proposed finding of fact. (R. 73, 80-145).

XXII.

The court erred in refusing to adopt defendants' proposed conclusion of law numbered II. (R. 73-74).

XXIII.

The court erred in refusing to adopt defendants' proposed conclusion of law numbered III. (R. 74).

XXIV.

The court erred in refusing to adopt defendants' proposed conclusion of law numbered IV. (R. 74).

XXV.

The court erred in refusing to adopt defendants' proposed conclusion of law numbered V. (R. 75).

SUMMARY OF ARGUMENT

I.

Under paragraph numbered "8" of the lease, making the lease subject to the regulations of the Secretary of the Interior, and under regulation 27, then in effect, providing that a lease "will be cancelled by the Secretary of the Interior for good cause upon application," good cause for cancellation was shown and given by the lessee to the Secretary of the Interior. The showing, supported by uncontradicted evidence, was that, —

- (a) The area had been adequately tested and proven non-productive;
- (b) There was no reasonable probability of obtaining production from the area;
- (c) Further drilling would be useless, and an unjustified economic waste; and
- (d) Lessee had done everything required to comply with the provisions of the lease and the provisions for cancellation and surrender.

Good cause being shown, the Secretary of the Interior was required to accept the application.

II.

The Government's own investigation file showed that there was good cause for surrender of the lease and it contained no facts upon which a refusal to consent to surrender could be based.

III.

The Government has utterly failed to prove the

material allegations of its complaint "that the said R. E. Lee failed, refused and neglected to show cause."

IV.

Under paragraph numbered 7 of the lease providing that "the lessee may, with the consent of the Secretary of the Interior, surrender this lease" the lessee surrendered the lease and applied to the Secretary of the Interior for such consent and the Secretary was required to give his "consent" because:

- (1) Regulation 27, which was made a part of the lease by section 8 thereof provided that a lease "will be cancelled by the Secretary of the Interior for good cause, upon application";
- (2) Good cause was shown both by the lessee and by the Government's own representatives;
- (3) Not a single fact appeared from lessee's presentation or from the Government's own investigation to justify or support the Secretary's refusal to accept lessee's application for surrender and cancellation;
- (4) There was no fact or circumstance upon which a reasonable man could have refused consent;
- (5) Section 7 of the lease must be construed to have been inserted for a purpose, must be given a reasonable interpretation and must be considered in the light of section 8 of the lease and section 27 of the regulations;
- (6) The lessee was required only to render a performance which would be satisfactory to a reasonable man.

V.

As an executive officer the Secretary of the In-

terior is not permitted to act arbitrarily and he acted arbitrarily in refusing the applications of the lessee for surrender and cancellation of the lease.

VI.

The Secretary's action in refusing to accept lessee's application for surrender and cancellation was *entirely* unsupported by evidence.

VII.

Under an implied provision of the lease the lessee was excused from further performance because of the absolute futility of drilling further wells and because the presence of oil and gas was proved not to exist, this being the subject matter of the lease contract.

ARGUMENT

I.

UNDER PARAGRAPH NUMBERED "8" OF THE LEASE, MAKING THE LEASE SUBJECT TO THE REGULATIONS OF THE SECRETARY OF THE INTERIOR, AND UNDER REGULATION 27, THEN IN EFFECT, PROVIDING THAT A LEASE "WILL BE CANCELLED BY THE SECRETARY OF THE INTERIOR FOR GOOD CAUSE UPON APPLICATION," GOOD CAUSE FOR CANCELLATION WAS SHOWN AND GIVEN BY THE LESSEE TO THE SECRETARY OF THE INTERIOR.

The showing, supported by uncontradicted evidence, was that, —

- (a) The area had been adequately tested and proven non-productive;
- (b) There was no reasonable probability of obtaining production from the area;

- (c) Further drilling would be useless, and an unjustified economic waste; and
- (d) Lessee had done everything required to comply with the provisions of the lease and the provisions for cancellation and surrender.

Good cause being shown and there not being a single fact to justify any other action, the Secretary of the Interior was required to accept the application.

By proposed amendments (R. 46) to the answer, by an understanding between counsel in open court (R. 56) and by proof at the trial (R. 94-5), appellants called the court's attention to regulation 27 of the regulations governing the leasing of Tribal lands for mining purposes, approved by the Secretary of the Interior, on July 23, 1924, and in effect during all the period involved in this case. This regulation 27 provides:

"A lease will be canceled by the Secretary of the Interior for good cause upon application of the lessor or lessee, or if at any time the Secretary is satisfied that the provisions of the lease or of any regulations heretofore or hereafter prescribed have been violated. When the lessee applies for cancellation of an approved lease he shall pay a surrender fee of \$1, and all royalties and rents due to the date of completion of such application must be paid before the same will be considered, and the parts of the lease held by the lessor and the lessee shall be surrendered, together with a properly executed and recorded release of record if the lease has been recorded. No part of any advance royalties shall be refunded to the lessee, nor shall he be relieved from his obligation to pay advance royalties and rentals in lieu of development annually when due by reason of any subsequent surrender or

cancellation of the lease. Upon cancellation of a lease the lessor shall be entitled to take immediate possession of the land." (R. 95-96). See this regulation also in 6 Summers, Oil and Gas, p. 316.

Paragraph "8" of the lease provides:

"8. This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease: Provided, That no regulations made after the approval of this lease shall operate to affect the term of lease, rate of royalty, rental or acreage, unless agreed to by both parties." (R. 17).

Clearly regulation 27 was a part of and a condition of the lease.

An application for cancellation (Defendants' Exhibit 2) was addressed to the Secretary of the Interior on December 4, 1936, by the lessee (R. 84-86, 115). It pointed out that one well on the leased land was completed as a dry hole and that other developments on adjoining lands had resulted in dry holes. This was the original application for cancellation of the lease. Thereafter, and on July 9, 1937, the lessee was advised that consideration "has been given to your application for cancellation" and "you will be allowed thirty days from the date of this letter within which *to show cause*" (italics supplied) why the lease should not be cancelled and the bond amount paid. (Exhibit "C" to the complaint, R. 24-26). The original application showed facts sufficient to constitute good cause for cancellation and it clearly appears from the letter of July 9, 1937, that considera-

tion was still being given to this application. In response to this letter the lessee again made a showing of good and sufficient cause by a further letter to the Secretary of the Interior. (Defendants' Exhibit 10, R. 104-110).

The good cause shown by the original application for cancellation, and reiterated again at the Government's request, and the true facts as shown by uncontradicted evidence were that:

- A. The area had been adequately tested and proven to be non-productive:

Every effort was made to develop a commercial well out of the one drilled on the leased premises. Approximately \$8,000 was spent on the well to comply with the terms of the lease after it was known that a commercial well could not be obtained. Prior thereto twelve wells had been drilled to the Madison limestone and none of them found oil and all found sulphur water. On an adjacent allotted lease, the same lessee drilled into Madison limestone and it was a dry well. Subsequent to drilling these two wells three other wells to the South and South and East of the leased lands were dry wells and abandoned. These wells were drilled over a structural range covering the entire premises, and proved that the land covered by the lease did not contain oil or gas.

- B. There was no reasonable probability of obtaining production from the area:

This was the opinion of a competent geologist acquainted with the field and these premises and was supported by the dry wells drilled over the structural range.

- C. Further drilling would be useless and an unjustified economic waste.

This is apparent from the above-recited facts.

D. Lessee did everything required to comply with the provisions of the lease and the provisions for cancellation and surrender:

The well drilled on the leased premises cost \$25,000, of which sum \$8,000 was spent to comply with the terms of the lease after it was known that a commercial well could not be obtained. The well was abandoned according to regulations and under the direction of the United States Geological Survey. (Defendants' Exhibits 8 and 9, R. 97-102). Bonus payments in the amount of \$805.00 had been paid. (Defendants' Exhibits 4 and 5, R. 90-92). The cancellation fee of \$1.00 was paid. (Defendants' Exhibit 6, R. 93-94). Lessee surrendered the lease and abandoned the property. (R. 118). The lease had never been recorded. (R. 119).

Defendants' application for surrender (Defendants' Exhibit 2, R. 84-86) was filed in the office of the Geological Survey at Casper and was transmitted by H. J. Duncan, Supervisor of the district office in Casper, Wyoming, of United States Department of the Interior Geological Survey, to the Superintendent of the Blackfeet Indian Agency. The letter of transmittal (Defendants' Exhibit 3, R. 87-88) stated:

“ * * * I cannot justify any requirements for the additional three wells in view of the dry hole drilled on the lease, and the dry hole drilled in the SW NE Section 26, T. 33 N., R. 6 W.

“It is therefore recommended that the request for cancellation be accepted and the fee of \$1.00 be deposited to the credit of the Tribe. Will you kindly advise this office the date of cancellation, in order to clear our records? Form 9-614 and a check for \$1.00 are attached hereto.”

This information was in the hands of the Secretary of the Interior on July 7, 1937, when he gave a fur-

ther period of time within which "to show cause". At that very time then the Secretary had "good cause" for accepting the request for cancellation, the good cause being furnished by a scientific branch of his own department together with a recommendation of acceptance of the requested cancellation. Moreover, the Secretary knew that the opinion of the local field officer of the Geological Survey was supported by the Director of the Geological Survey. In a letter from the Assistant Commissioner of Indian Affairs to the Secretary of the Interior, dated November 17, 1937, it is recited in part:

"As stated in Office letter of May 29, the Director and the local field officer of the Geological Survey are of the opinion that the lands included in both the tribal and the allotted lease have been adequately tested." (Defendants' Exhibit 10, R. 112).

In other words, there was no fact contrary to the good cause shown by the lessee. No fact or circumstance was before the Secretary of the Interior which did not demand acceptance of the request for cancellation. True the Blackfeet Tribal Council wanted the bond forfeited "for failure to comply with drilling requirements", (R. 112), but that is the very matter in question, i. e. whether there was a showing of "good cause" which would operate to require the Secretary to cancel the lease, relieve the lessee from further drilling and release the bond. It has been the position of the United States during the entire case that it lay within the power of the Secretary of the Interior to act as he saw fit. This

is borne out by the plaintiff's motion for judgment on the pleadings, (R. 41) by the limited nature of its proof and the failure to offer any evidence in rebuttal and by the nature of its proposed findings of fact and conclusions of law. (R. 58-64).

By the clear terms of paragraph "8" of the lease, regulation 27 was "a part of and condition" of this lease. Moreover, the Assistant Commissioner of Indian Affairs seems to have been guided thereby in his letters giving time "to show cause".

There was no justification for not giving heed to the "good cause" shown. The Geological Survey could not "justify any requirement for the additional three wells". (R. 88). The Secretary of the Interior denied the application without any basis in fact or in reason upon which to justify his refusal; he clearly violated and disregarded the plain language of his own regulation.

We believe the term "good cause" needs no interpretation in this case where it seems impossible to have shown any better cause and where there were no facts or circumstances other than those shown by the lessee and the Geological Survey.

The language of the regulation is "will be cancelled by the Secretary of the Interior for good cause". In that wording no basis exists for the exercise of administrative discretion when there are no facts except those showing good cause. The "good cause" was clearly shown. It must be accepted. The Secretary cannot excuse his rejection of the showing. Certainly he cannot now demand payment of the

bond when he has clearly violated the terms of a condition subsequent which permits a cancellation of the lease. Certainly he cannot flagrantly violate his own rules and play the game according to extemporeaneous catch as catch-can rules made solely by himself. He even disregarded the Geological Survey as a referee.

Clearly in this case the lessee acted in good faith and assigned good cause for the application to cancel.

This oil and gas lease must be considered as cancelled upon application made by, and for good cause shown by, the lessee acting in good faith at a time when he had fully complied with every obligation of the lease and of the regulations.

II.

THE GOVERNMENT'S OWN INVESTIGATION FILE SHOWED THAT THERE WAS GOOD CAUSE FOR SURRENDER OF THE LEASE AND IT CONTAINED NO FACTS UPON WHICH A REFUSAL TO CONSENT TO THE APPLICATION FOR SURRENDER AND CANCELLATION COULD BE BASED:

From the Government's own files defendants secured their exhibit number 3. (R. 87-88). This was the letter from H. J. Duncan, Supervisor of the United States Geological Survey at its district office in Casper, Wyoming. That office had charge of the territory which included the land involved in this case. (R. 89). By that letter Mr. Duncan advised that he could not

"justify any requirement for the additional three wells in view of the dry hole drilled on the lease,

and the dry hole drilled in the SW NE Section 26, T. 33 N., R. 6 W."

He thereupon and therefore

"recommended that the request for cancellation be accepted and the fee of \$1.00 be deposited to the credit of the Tribe."

From the Government's own files came defendants' exhibit 11. (R. 111-114). This was a letter dated November 17, 1937 and addressed to the Secretary of the Interior by William Zimmerman, Jr., Assistant Commissioner of Indian Affairs. Therein it appears that a prior recommendation had been made in May of 1937 that the Secretary cancel the lease at the request of the lessee and

"that he be relieved of liability under a bond given to secure performance of the lease."

Again referring to the office letter of May, 1937, it was pointed out that:

"The director and the local field officer of the Geological Survey are of the opinion that the lands included in both the tribal and the allotted lease have been adequately tested."

It is thus apparent that the Government's own files included the facts of good cause for the lessee's request for cancellation and that this good cause had been furnished by the recommendations of the District Supervisor of the United States Geological Survey, by the Director of the United States Geological Survey and by the Assistant Commissioner of Indian Affairs. It is also apparent from Exhibit "C" attached to the complaint (R. 24-26) that the lessee's

original application for cancellation was being considered.

In contrast with this strong showing of good cause from its own files the Government made no effort of any kind or character to show that the Secretary of the Interior had any fact or circumstance before him to cause him to deny the application. This is consistent with the Government's position that the Secretary of the Interior had the completely unrestricted power to deny the requested cancellation.

Indeed it seems apparent that under the circumstances disclosed by its own files this is the only possible position which the Government could take. We submit that it is a very strange and striking anomaly for the Government to inform a lessee that he has an opportunity to show cause when it can be demonstrated from the Government's own files that it paid absolutely no attention to the good cause shown by its own investigating officers.

We urge that the good cause shown by the lessee was amply corroborated, verified and sustained by the findings and reports of officials within the Department of Interior and that such findings and reports were brought to the attention of the Secretary of the Interior not once but a number of times.

III.

THE GOVERNMENT HAS UTTERLY FAILED TO PROVE THE MATERIAL ALLEGATIONS OF ITS COMPLAINT "THAT THE SAID R. E. LEE FAILED, REFUSED AND NEGLECTED TO SHOW CAUSE".

In paragraph XI of the complaint it is alleged that

on July 9, 1937, Lee was given "a notice in writing as required in said lease". (R. 6-7). Exhibit "C" attached to the complaint sets forth the letter to Mr. Lee of July 9, 1937 and specifies a time within which he was allowed "to show cause" why the lease should not be cancelled and the bond paid. Paragraph XII of the complaint alleged

"that the said R. E. Lee failed, refused and neglected to show cause, as required by said notice, within thirty days, or at all, why the said lease should not be cancelled."

The Government utterly failed to prove that Lee failed, refused and neglected to show cause as required by this notice. Indeed the uncontradicted evidence as shown by defendants' Exhibit 10 (R. 104-110) is that Lee did in fact respond to this notice and did again, as he had originally done, show good cause. Even more striking is the fact that the Government's own investigation file showed good cause from its own investigating officers for accepting the requested cancellation and showed that such investigating officers recommended that the lessee be relieved of liability under the bond.

It is abundantly clear, therefore, that the Government itself failed to prove the allegations of Lee's failure to show cause. The Government has admitted that the notice in writing given to Lee on July 9, 1937, was given "as provided in said lease". True enough the Government has, in paragraphs XI and XII of the complaint, alleged that at that time Lee was in default. We deny that such is true be-

cause of Lee's application for cancellation made December 4, 1936. (Defendants' Exhibit 2, R. 84-86). The Government's allegations as to failure to show cause were material, were not supported by any proof on behalf of the Government and were entirely refuted by uncontradicted evidence on behalf of the defendants and by uncontradicted evidence that came from the Government's own files.

We urge that under such circumstances there has been a material failure of proof on behalf of the Government and that the Government's case should be dismissed and judgment entered on behalf of the defendants.

IV.

"UNDER PARAGRAPH NUMBERED "7" OF THE LEASE, PROVIDING THAT "THE LESSEE MAY, WITH THE CONSENT OF THE SECRETARY OF THE INTERIOR, SURRENDER THIS LEASE," LESSEE APPLIED TO THE SECRETARY OF THE INTERIOR FOR SUCH CONSENT AND THE SECRETARY WAS REQUIRED TO GIVE HIS "CONSENT" BECAUSE GOOD CAUSE HAD BEEN SHOWN UNDER REGULATION 27 AND BECAUSE THERE WAS NO FACT OR CIRCUMSTANCE UPON WHICH A REASONABLE PERSON COULD HAVE REFUSED "CONSENT".

Under paragraph 7 of the lease it is provided that "the lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part." Defendants proved that the lessee made application for such a surrender, showing all the facts

which we have discussed above in relation to good cause.

- A. *Section 7 of the lease must be construed to have been inserted for a purpose and must be given a reasonable interpretation.*

Appellee has heretofore urged that, where consent is required, the power to withhold consent is implied and cannot be the subject of compulsion. Ordinarily, this is a correct statement of an abstract principle of law. It fails in its application to this case. Without further facts appearing, consent is normally required to excuse a promisor from non-performance of his obligations under a contract. This is true where the contract makes no mention of consent. In such cases, however, performance may be excused because of other circumstances such as impossibility of performance or non-existence of the subject matter found to be an essential foundation of the obligation.

The insertion of the requirement to secure consent of the promisee for the surrender of a lease or the termination of a contract does not impose a greater obligation upon the promisor, but, rather, leads to the necessary and ordinary interpretation that the language of the contract must be given a construction as a whole which will afford to the contract a reasonable interpretation.

It is a primary rule of construction that a court must, if possible, ascertain and give effect to the mutual intent of the parties at the time a contract was made. *Waldorf System v. M. McDonough Co.*, (C.C.A. 1) 93 F. (2d) 363, cert. den. 303 U. S. 663.

Agreements must receive a reasonable interpretation. *Moran v. Prather*, 23 Wall. (U.S.) 492, 23 L. ed. 121. As a general rule, if there is doubtful language in a contract, it must be interpreted most strongly against the party who use it. *Garrison vs. U. S.*, 7 Wall. (U. S. 668, 19 L. ed. 277. A surrender clause in an oil and gas lease is for the benefit of the lessee. *1 Thornton, Oil and Gas (Willis)*, Sec. 101a, p. 180. The surrender clause was introduced in oil leases to enable the lessee to be relieved of further performance after the land has proven to be non-productive. *1 Thornton, Oil and Gas (Willis)*, Sec. 101a, p. 182. If he did not have such a right, he would find himself in a position where he would have to make wasteful, futile and useless expenditures drilling wells which would be of no benefit to anyone.

It would appear that there was no reason for the insertion of the provision for securing consent of the Secretary to a surrender if the plaintiff sought thereby to confer upon the Secretary the untrammeled, unrestricted, unabridged and arbitrary power to refuse consent. Rather, would it appear that the provision should be naturally interpreted to prevent the exercise of arbitrary dissatisfaction by the Secretary of Interior.

B. *Lessee was required only to render a performance which would be satisfactory to a reasonable man.*

We urge that, where one test well has been drilled upon a 470-acre tract covered by the leace and five test wells have been drilled in the immediate vicinity

and over the entire structural range and where there is no probability of the existence of oil or gas in the leased lands and where the Secretary has acted arbitrarily, unreasonably, contrary to the opinion of his own geological experts and without any facts upon which to base his action in refusing to give his consent to a surrender of the lease, then, and in that case, the lessee is excused from further performance under the lease, is excused from the requirement of drilling further wells and no recovery may be had upon the bond given in support of the lease.

Satisfaction of the promisee in a contract providing for a definite mechanical or financial or other result (other than a satisfaction of his whim, caprice, fancy, taste, sensibility or judgment) requires only a performance which reasonably ought to satisfy or should be satisfactory to a reasonable man. Dissatisfaction in such cases "is treated as unreal or fraudulent." *Shepherd vs. Union Central Life Ins. Co.*, (C.C.A. 5), 74 Fed. (2) 180, 181. In *Adamson vs. Alexander Milburn Co.*, (C.C.A. 2), 275 Fed. 148, 157, the court said:

"We think it also not improper to point out that where something is to be done to the 'satisfaction' of a particular person, and it is not simply a matter of personal taste, fancy, or caprice, to justify a rejection of the work and refusal to pay the rejection cannot be *arbitrary* or *unreasonable*. A simple allegation of dissatisfaction without a good reason is no defense." (italics supplied).

In doubtful cases courts are inclined to construe an agreement as requiring performance in such a way

as reasonably ought to satisfy the promisee. *Bishop vs. Bloomington Canning Co.*, 307 Ill. 179, 138 N.E. 597, 598. Ordinarily, a contract will be construed as not reposing in one of the parties the unqualified option or power to refuse performance. *Gould vs. McCormick*, 75 Wash. 61, 134 Pac. 676. *Restatement of the Law of Contracts*, sec, 265. Under this oil and gas lease we urge that the performance by the lessee was not designed for the purpose of suiting the esthetic taste or the arbitrary sensibilities or the capricious judgment of the Secretary of the Interior. This seems so obvious as not to require further belaboring of the point.

Paragraph 7 must be read and considered in connection with paragraph 8 and regulation 27. Considered jointly "consent" to surrender cannot be deemed an arbitrary prerogative of the Secretary. It must be deemed to require a performance or showing no greater than the rule invoked in "satisfaction" contracts which requires only a performance which ought reasonably to satisfy a reasonable man. The Secretary recognizes this by regulation 27 in which he says that if good cause is shown he *will* cancel a lease on application of either party.

V.

AS AN EXECUTIVE OFFICER THE SECRETARY OF THE INTERIOR IS NOT PERMITTED TO ACT ARBITRILY AND HE ACTED ARBITRILY IN REFUSING THE APPLICATIONS OF THE LESSEE FOR SURRENDER AND CANCELLATION:

The Secretary of the Interior, an administrative

officer of the United States, was required to act reasonably upon the facts presented in the lessee's application. Good cause being shown for a surrender and cancellation, he could not act arbitrarily and contrary to the facts presented to him and known by him.

In *Aniker vs. Gunsburg*, 246 U. S. 110, 38 S. Ct. 228, 62 L. ed. 603, the question involved was whether the Secretary of Interior could act arbitrarily in approving or refusing to approve an oil and gas lease on Creek Indian lands. The court said that the Secretary, of course, had power under the statute to consider the advantages and disadvantages of the lease presented for his action and to exercise his judgment, but that he certainly could not act arbitrarily. The court's conclusion on this point was: (U. S. at p. 119).

"The statute is plain in its provisions—that no lease, of the character here in question, can be valid without the approval of the Secretary. Such approval rests in the exercise of his discretion; unquestionably this authority was given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation. *It is also true that the law does not vest arbitrary authority in the Secretary of the Interior.*" (italics supplied).

In *Williams vs. United States*, 138 U. S. 514, 11 S. Ct. 457, 34 L. ed. 1026, the court considered the duty of the Secretary of the Interior to approve the acts of the State authorities of Nevada in selecting lands under a grant made by the Federal Govern-

ment. In discussing the authority of the Secretary, the court said: (U. S. at p. 524:)

“We would not be misunderstood in respect to this matter. *We do not mean to imply that any arbitrary discretion is vested in the Secretary;* but we hold that the statute requiring approval by the Secretary of the Interior was intended to vest a discretion in him by which wrongs like this could be righted, and equitable considerations, so significant and impressive as this, given full force.” (italics supplied).

In a third case the Circuit Court of Appeals of the Tenth Circuit held that a determination of the Secretary of the Interior of the proper amount of royalty to be paid under a lease on allotted Indian lands was final “*in the absence of a showing of arbitrary action or fraud*”. *Hallam v. Commerce Mining & Royalty Co.*, (C.C.A. 10) 49 Fed. (2d) 103, 109, cert, den. 284 U. S. 643.

We urge that the Secretary of the Interior in considering a request for cancellation upon good cause shown and for consent to the surrender of an oil and gas lease could not act arbitrarily, unreasonably and without regard to the facts and cannot render a decision which has no factual foundation and which is contrary to all of the facts which are presented to him.

There are occasions in times of stress, especially in times of war, when the executive department may have occasion to act in an arbitrary manner. But in ordinary dealings with the public, in ordinary contractual relations, there is no occasion and no excuse for the attempted use and display of arbitrary

action. Moreover, when arbitrary action can be followed only by ignoring rules and regulations adopted as a safeguard therefrom, it is all the more apparent that this court must enforce the safeguard and protect the contractual rights of the private parties to the lease and bond. Rule 27 is the safeguard and as *all* of the facts show good cause for surrendering the lease the Secretary must have ignored the rules and the facts.

VI.

SECRETARY'S ACTION ENTIRELY UNSUPPORTED BY EVIDENCE.

The foregoing pages show that this is a very rare and unusual case, in which there are no facts presented, of any kind, to support or justify the Secretary's action. His own investigation corroborated the good cause presented by Lee. It did not produce any fact to justify his refusal of Lee's application for surrender and cancellation.

No question is presented of the right of the Secretary to decide, in accordance with his best judgment, where there are conflicting facts and where a refusal to accept the application for surrender and cancellation would be supported by substantial evidence.

The real issue is "Can the Secretary decide against a Lessee without regard for the facts and without having any Court review his decision?" The United States Attorneys in the argument before the Federal District Court met this question directly and contended that the Secretary has absolute power and discretion, regardless of the facts, that his decision

will be considered as having been his best judgment and is not and should not be reviewed by any Court.

We do not believe that the United States Constitution or system of Government ever contemplated that an administrative officer of the Executive Department could act arbitrarily and without regard to the facts presented and that the Courts of the United States would not review his action.

We do not expect ever again to see a case where all of Lessee's allegations and proof are confirmed and corroborated by all of the facts disclosed by the Government's own investigation.

If the Court will not review and reverse the action of the Secretary of the Interior in this case, it is impossible to contemplate any case in which the Court would review and reverse any action of any administrative officers of the United States Government.

VII.

UNDER AN IMPLIED PROVISION OF THE LEASE THE LESSEE WAS EXCUSED FROM FURTHER PERFORMANCE BECAUSE OF THE ABSOLUTE FUTILITY OF DRILLING FURTHER WELLS AND BECAUSE THE PRESENCE OF OIL AND GAS WAS PROVED NOT TO EXIST, THIS BEING THE SUBJECT MATTER OF THE LEASE CONTRACT.

We urge that the continuation of a prospect of discovering oil or gas on the leased premises constituted the subject matter and essential foundation of the lease contract and that when this essential foundation is shown to have become non-existent subsequent to the formation of the contract, per-

formance is excused and the contract terminates by operation of law.

The principle that non-performance is excused where, without the fault of the promisor, performance becomes impossible by the cessation of the existence of a necessary thing or person, applies equally to cases where the event which renders the contract incapable of performance is the cessation or non-existence of a state of things going to the essence or essential foundation of the obligation. *Swiss Oil Corporation vs. Riggsby*, 252 Ky. 374, 67 S. W. (2) 30; *Mineral Park Land Company vs. Howard*, 172 Cal. 289, 156 Pac. 458, L.R.A. 1916 F. 1; *Restatement of the Law of Contracts*, sec. 461; (Note) 12 A.L.R. 1273 at 1287 (dealing with timber and mines). In *Swiss Oil Corporation vs. Riggsby*, 252 Ky. 374, 67 S.W. (2d) 30, the court stated (S.W. at p. 34):

"We cannot, therefore, agree with counsel for appellant that only the explicit letter of the contract must be regarded. The law recognizes that the continuation of the subject-matter of the contract is the essential foundation of the obligation. And when that subject-matter is shown to have become nonexistent, performance is excused and the contract terminates by operation of law. 6 R.C.L. 1005; *Hall v. Eversole's Adm'r.*, 251 Ky. 296, 64 S.W. (2d) 691. As stated in *Willis' Thornton on Oil and Gas*, sec. 243: 'As the object in leasing oil or gas premises is to secure the oil or gas beneath the surface, as soon as it has been demonstrated that no oil, in case of an oil lease, or no gas, in case of a gas lease, is beneath the surface, or it does not exist in paying quantities, the lessee may abandon the

premises or his lease; or if the oil or gas becomes exhausted he may in like manner abandon them.' See, also, 40 C.J. 1034, 1055. * * * *

"The principle of declaring or considering a lease terminated and the royalty obligation cancelled when the subject-matter fails has been considered and applied in several cases where coal and other solid minerals were shown to have been exhausted or to be nonexistent. Many of them are reviewed in *Laurence E. Tierney Land Company v. Kingston-Pocahontas Coal Company*, 241 Ky. 101, 43 S.W. (2d) 517."

The primary object of the parties under the lease was to secure the development of the leased premises for either oil or gas. It was the duty of the lessee to use reasonable diligence to obtain production so that the benefits contemplated by the parties may be obtained. *Tucker v. Canfield*, (C.C.A. 8) 276 Fed. 385; 1 *Thornton Oil and Gas*, (Willis), Sec. 156, p. 273. But the circumstances may be such as to excuse the drilling of any test wells or of further wells. *Rice v. Ege*, (C.C.N.Y.) 42 Fed. 661; 1 *Thornton, Oil and Gas*, (Willis), Sec. 200, p. 353.

In *Swiss Oil Corporation vs. Riggsby*, 252 Ky. 374, 67 S.W. (2d) 30, an oil and gas lease for ten years, or as long as oil and gas was found in paying quantities and in quantities sufficient to transport, called for a minimum drilling of two wells or a royalty of \$200.00 a year. There were wells all around the 75-acre tract covered by the lease, but no wells were drilled upon the lease, the lessee paying \$200.00 a year in lieu of drilling. The lessee had 69 other gas wells in the field, but ceased marketing the gas ex-

cept in negligible quantities after production costs exceeded receipts. Thereupon, the lessee sought to surrender the lease. Finding that there was convincing proof that at the time of the attempted surrender, gas was no longer present in paying quantities or in quantities sufficient to transport, the court held that the lessors were not entitled to any damages or recovery. The court specifically held that there was an implied condition that futility of performance would avoid the obligation, (S.W. at p. 33-4) :

“There is another principle widely recognized and applied to various classes of contracts. It is thus stated in *Texas Company v. Hogarth Shipping Company*, 256 U.S. 619, 41 S. Ct. 612, 614, 65 L. Ed. 1123: ‘It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability the contract must be regarded as subject to an implied condition that, if before the time for performance and without the default of either party the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it.’

“Early English cases declaring and distinguishing the principles are discussed in *Singleton v. Carroll*, 6 J. J. Marsh, (29 Ky.) 527, 22 Am. Dec. 95, from which the conclusion was reached that the owner of a slave could not recover his value of his hirer on account of a failure to return him at the end of the term according to the contract because the slave had run away.

"This implied condition has come to be designated as impossibility of performance, although in some instances it is rather lax nomenclature, for in many cases it is not a matter of impossibility but of futility.

Supporting this view is the earlier case of *Ward vs. Daugherty*, 228 Ky. 326, 14 S.W. (2d) 1089, 1090. There, the oil and gas lease provided that in the event a test well being drilled on an adjoining farm should prove to be dry, the lessee should drill two test wells on the leased premises within a specified time. The well on the adjoining farm was dry and the lessee drilled one test well on the leased premises, which proved to be dry. Thereupon, lessee abandoned the lease without drilling the second well as agreed. The lessor was held to be entitled only to nominal damages, there being no allegation of the existence of oil or gas on the leased premises. The court declared, (S.W. at p. 1090):

"It is difficult to see how appellant's lands would have been enhanced in value by drilling another test well, unless it proved to be a producer, or how he could be damaged by a failure to drill such well, unless it could be asserted that oil exists therein. It must not be overlooked that the contract is to be construed from the viewpoint of both parties and it is not to be thought that lessee was interested in testing appellant's land except for the purpose of development."

Commenting on this decision, the court, in *Swiss Oil Corporation vs. Riggsby*, 252 Ky. 374, 67 S.W. (2d) 30, stated (S.W. at p. 35)

"The obligation in that contract to drill the second well, which would have been futile, was

no less than the obligation in this contract to continue payment in lieu of drilling two wells, which would also have been futile."

In *Woodworth vs. McLean*, 97 Mo. 325, 11 S. W. 43, McLean contracted for an interest in land, agreeing to sink a shaft 500 feet on the vein of ore cropping out on the claim. After sinking the shaft 330 feet he refused to carry it farther because the vein or mineral had given out. The court denied recovery on the owner's suit for damages for alleged breach of contract.

The presence in this lease of the express provisions as to surrender and cancellation gives greater reason and occasion for the existence of an implied condition that futility of performance by a lessee, who has acted in good faith and spent large sums of money in attempted development, will excuse further performance. It is upon this basis that we distinguish such cases as *Fidelity & Deposit Co. of Maryland v. Jones*, 256 Ky. 181, 75 S.W. (2d) 1057 and *Gibson v. Oliver*, 158 Pa. 277, 27 Atl. 961, heretofore relied upon by appellee.

Under the circumstances here involved, we urge that further performance on the part of the lessee was excused because the essential foundation of the contract was shown to have become non-existent subsequent to the formation of the contract.

CONCLUSION

We submit that there has seldom been a more flagrant disregard of facts, a more patent refusal to heed the scientific findings within his own de-

partment, a more arbitrary refusal to abide by the express and implied terms of a contract of his own making, or a more obvious attempt to collect an additional bonus, than the refusal of the Secretary of the Interior to accept the lessee's applications for cancellation and surrender of this lease. The judgment below should be reversed and directions given for the entry of judgment for the defendants-appellants.

Respectfully submitted,

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No. 10293

In the United States Circuit Court of Appeals
for the Ninth Circuit

R. E. LEE AND STANDARD ACCIDENT AND INSURANCE
COMPANY, A CORPORATION, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MONTANA*

BRIEF FOR THE UNITED STATES

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In the United States Circuit Court of Appeals for the Ninth Circuit

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v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MONTANA*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The unreported opinion of the district court appears at pages 74-76 of the record.

JURISDICTION

This is an appeal by R. E. Lee and the Standard Accident Insurance Company from a final judgment of the district court entered June 27, 1942 (R. 77-79). Notice of appeal was filed by them on September 21, 1942 (R. 79). The jurisdiction of the district court was invoked by the United States (R. 2) under section 24 of the Judicial Code, as amended, 28 U. S. C. sec. 41 (1). The jurisdiction of this Court rests on sec-

tion 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

STATUTE INVOLVED

The Act of May 29, 1924, c. 210, 43 Stat. 244, so far as material, provides:

That unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 (Twenty-sixth Statutes at large, page 795), may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities * * *.

QUESTION PRESENTED

Whether the Secretary of the Interior has the right to insist on the drilling of the number of test wells specified in an oil and gas lease executed pursuant to the Act of May 29, 1924, c. 210, 43 Stat. 244, and, upon failure to drill the wells, to demand payment of the bond made to insure performance.

STATEMENT

On January 24, 1936, the Secretary of the Interior approved a lease made by the Superintendent of the Blackfeet Indian Tribe to R. E. Lee of certain tribal land (470 acres) near Cut Bank, Montana, for oil and gas mining purposes (R. 9-20, 60). The lease provided

that the lessee drill "at least (Four) wells on the premises within one year from date of such approval" (R. 13, 61). It further provided "that if the said lessee shall fail or refuse to drill as provided herein, or fail to obtain an extension of the time within which to drill he shall pay to the officer in charge, for the benefit of the Blackfeet Tribe of Indians, the full amount for which this lease is bonded" (R. 7, 14, 26). A bond in the amount of \$6,000.00 to insure performance of the terms and conditions of the lease was executed by R. E. Lee, as principal, and the Standard Accident Insurance Company, as surety (R. 21-24, 60-61).

On December 4, 1936, the lessee applied to the Secretary of the Interior for cancellation of the lease and release from liability under the bond on the grounds that he had drilled one well which was not productive and that other developments on adjoining land were also unsuccessful which facts "point to the improbability of obtaining oil or gas by further developments or drilling" (R. 38). The lessee was notified by letter dated July 9, 1937, that he was given 30 days within which to show cause why the lease should not be cancelled and payment of the full amount of the bond demanded (R. 24-26). In answer to this notice to show cause, the lessee wrote to the Secretary of the Interior on August 12, 1937 (R. 39, 82) explaining the extent of the drilling on the land and in the vicinity, and stating that he believed further drilling would be useless, that he understood the bond was only for the purpose of making sure that "proper drilling, casing and abandonment procedure were followed," that he believed

section 7 of the lease permitted him to surrender the lease without liability under the bond and that any other interpretation of the lease would have a "detrimental effect on the future sales of Indian lands in the Cut Bank fields" (R. 50-56).

After the matter had been "carefully considered" (R. 40) and the Indian lessors consulted (R. 40, 112), the Secretary of the Interior cancelled the lease on January 10, 1938, and held the lessee and his surety liable for the full amount of the bond (R. 21). Notice of this action by the Secretary and a demand for payment within 30 days were forwarded to the lessee and his surety on February 3, 1938 (R. 39-40). Payment not having been received, this suit was instituted in the district court on December 18, 1939, to collect the amount of the bond with interest from February 3, 1938 (R. 2-9). Judgment in favor of the United States was entered June 27, 1942 (R. 77-79). Notice of appeal from the judgment was filed by R. E. Lee and the Standard Accident Insurance Company on September 21, 1942 (R. 79).

ARGUMENT

I

By specific provisions in paragraph 4 of the lease the Secretary of the Interior reserved absolute power to insist on the drilling of at least four test wells

Since it is a matter of common knowledge that the opinions of experts differ widely as to the probability or improbability of finding oil or gas underlying a specific tract of land, it is entirely reasonable for a lessor to reserve to himself the absolute power to insist

on the only conclusive method of determining whether oil or gas underlies his property, namely, the actual drilling of several regularly spaced test wells. If he did not reserve this power as to the first lessee, then he might never have his land fully tested because each dry well would increase the risk of not finding oil or gas and would thus serve to discourage subsequent prospective lessees. Cognizant of these facts the Secretary of the Interior expressly reserved in the lease under consideration the absolute power to insist upon the drilling of a specified number of test wells or the forfeiture of the bond for nonperformance. Paragraph 4 of the lease provides (R. 13, 14) :

The lessee agrees to begin drilling operations on the land covered by this lease within (90) days from the date of approval hereof by the Secretary of the Interior and to drill at least (Four) wells on the premises within one year from date of such approval: and to drill four wells during each successive year thereafter until as many wells have been drilled as there are forty acre tracts or fractional parts thereof included in the lease; and thereafter to diligently drill such additional wells as may be necessary and proper in the judgment of the Secretary of the Interior to fully develop the land and extract the oil and gas therefrom in accordance with the most approved methods of drilling development in the field where the lands are located. It is further understood and agreed that the completion of a well is to be considered a minimum depth of one hundred (100) feet into the Madison limestone, unless production in paying quantities is found at a lesser depth. If the

lessee shall fail to drill any or all of the wells as herein provided, such failure shall be a violation of one of the material and substantial terms and conditions of this lease and be sufficient cause for cancellation of this lease, but such cancellation shall not in any way serve to release or relieve the lessee or surety from the covenants and obligations to pay any accrued obligation: Provided, That the Secretary of the Interior may, in his discretion, upon application of the lessee, extend the time within which any well shall be commenced upon the payment of annual rental of one dollar per acre, for each whole year the beginning of such well is delayed. For the guidance of the Secretary of the Interior, the Blackfeet Tribal Business Council will be consulted as to its opinion in this matter. It is further understood and agreed that if the lessee shall fail or refuse to drill as provided herein, or fail to obtain an extension of the time within which to drill he shall pay to the officer in charge, for the benefit of the Blackfeet Tribe of Indians, the full amount for which this lease is bonded. * * *

It is submitted that no language could more fully express an intention on the part of the Secretary of the Interior to require the wells to be drilled or the bond forfeited than that here used. The exaction of this condition was not unreasonable.² It must be remembered that the lessee submitted bids for the privilege of drill-

¹ Italics supplied throughout this brief.

² "Although a sand may not produce in one well it may be commercially productive in an adjoining or nearby well." Bulletin No. 232, "Manual for Oil & Gas Operations", Bureau of Mines, cited in *Forbes v. United States*, 127 F. 2d 404, 410 (C. C. A. 9, 1942).

ing wells on the property here involved. He was seeking a privilege from the Government, the fee owner of the property in question (R. 59-60). He was not obliged to enter into any lease with the Government. Having asked for a lease, the Secretary exacted as a condition that he drill a specified number of wells in order to fully test the land included in his lease. As was said in *Fidelity & Deposit Co. of Maryland v. Jones*, 256 Ky. 181, 192, 75 S. W. 2d 1057, 1062 (1934), a case involving a similar oil and gas lease:

The purpose of the lease was to drill the leased premises for oil, gas, and salt purposes, by putting down the number of wells thereon stated in the leases and within the time stated in the bonds. If it was intended by the parties that a test of the leased premises might be made by putting down wells outside thereof, the principal in the bonds and its surety should have protected themselves at the time of the execution of the bonds by a provision to that effect. They may not now rely on an implied covenant to that effect to escape their liability on the bonds. The bonds and leases evidenced the contract between the parties, and neither lessee nor its surety is entitled to declare the bonds unenforceable on the ground of the lessee's nonperformance, nor defeat a recovery thereon by alleging and proving that it can be shown by drilled wells in the vicinity of leased premises, there was at the time of either the making or breach of the bonds, neither gas, oil, nor salt in paying quantities on the leased premises.

The power of the Secretary to exact such a requirement in return for the privilege of drilling on Government-

owned property is not, and of course cannot, be questioned. Act of February 28, 1891, c. 333, 26 Stat. 794, 795, and Amendatory Act of May 29, 1924, c. 210, 43 Stat. 244; cf. *Forbes v. United States*, 125 F. 2d 404, 408 (C. C. A. 9, 1942).

II

The Secretary of the Interior did not bind himself in paragraphs 7 and 8 of the lease to accept less than the full test for oil or gas expressly provided by paragraph 4.

The appellants contend (Br. 23, 38) that the express requirements of paragraph 4 were modified by other provisions in the lease. They contend that paragraphs 7 and 8 make it obligatory on the Secretary to accept under certain circumstances a surrender of the lease. We disagree.

A. *Paragraph 7 of the lease does not require the Secretary to accept a proffered surrender.*—Paragraph 7 of the lease provides (R. 17) :

The lessee may, with the consent of the Secretary of the Interior, surrender this lease in whole or in part by paying to the officer in charge all amounts then due as provided herein and the further sum of one dollar and have this lease cancelled as to the part or parts surrendered and be relieved from all further obligations or liabilities thereunder * * *.

Thus it will be seen that paragraph 7 permits a lease to be cancelled “with the consent of the Secretary of the Interior.” Where consent is required the absolute power to withhold consent is implied. *State ex rel. United Rys. Co. of St. Louis v. Public Service Commis-*

sion of Missouri, 270 Mo. 429, 192 S. W. 958 (1917); *Rice v. Culver*, 172 N. Y. 60, 64 N. E. 761 (1902); *Builders Supply Co. v. North Augusta Elec. & Imp. Co.*, 71 S. C. 361, 51 S. E. 231 (1905).

B. *The provision of paragraph 8 incorporating general regulations does not require the Secretary to dispense with the drilling of wells provided for in paragraph 4.*—Paragraph 8 of the lease (R. 17) states that—

This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease.

Among the regulations then in force was Regulation 27, which provides (R. 143) that “A lease will be cancelled by the Secretary of the Interior for good cause upon application of the lessor or lessee * * *.” Appellants construe this regulation as requiring the Secretary to cancel a lease where “good cause” is shown. A general regulation incorporated into the lease in this indirect fashion should not be construed as dispensing with the express requirements of paragraph 4, which, as we have seen, were incorporated for a specific purpose, namely, to insure a complete test of the property covered by the lease. Regulation 27 reserves to the Secretary the determination of what constitutes good cause. It cannot be presumed that by his own regulation the Secretary intended to transfer to the courts the exercise of his discretion in determining this question. In fact Regulation 58 discloses that the Secretary’s decision “shall be conclusive.” Regulations

Governing the Leasing of Tribal Lands for Mining Purposes, approved July 23, 1924; 6 Summers, Oil and Gas (1939), sec. 1013; cf. *Smith v. United States*, 113 F. 2d 191 (C. C. A. 10, 1940).

The appellants urge that the Secretary of the Interior was required to cancel the lease and forfeit the bond because the lessee's performance was such as would satisfy a reasonable man (Br. 36-38). It is true that the cases involving contracts in which the satisfaction of the obligor is a condition precedent to payment hold that if the obligor should reasonably have been satisfied, the condition will be deemed fulfilled. The present lease does not fall within the class of cases to which appellants refer. In addition a clear distinction is made in those cases between situations in which his *judgment* is involved and situations involving operative fitness or mechanical utility. Only in the latter situations is reasonableness made the test. One reason for this is that only the latter situations are adapted to such a test. As appellants admit (Br. 37), where judgment is involved it is too difficult to fix a standard and there is too much room for disagreement for such a test. *Bishop v. Bloomington Canning Co.*, 307 Ill. 179, 185, 138 N. E. 597, 599 (1923); *McCrimmon v. Murray*, 43 Mont. 457, 469, 117 Pac. 73, 76 (1911). As stated previously and as shown by the testimony of the lessee (R. 119), the question whether oil or gas underlies a specific tract of land is one concerning which even the opinions of experts are unreliable. Experts and reasonable men may and often do disagree as to the existence or nonexistence of oil and where they agree that it does not exist, the judgment of men considered

unreasonable often proves them wrong (cf. R. 75). Therefore, in the present case, where the question to be determined is not only one for personal judgment but one as to which such judgment may easily be wrong, appellant's own statement of the law (Br. 37) that matters involving the judgment of the promisee are excluded from the "satisfaction of a reasonable man" rule is peculiarly applicable. Moreover, even if the existence or nonexistence of oil were a matter as to which general agreement were possible, the fact that the lease involved does not make satisfaction, reasonable or otherwise, the test but specifies expressly how the property shall be tested for oil, namely, the drilling of at least four wells (R. 13), removes all doubt as to the inapplicability of the above rule. *Fidelity & Deposit Co. of Maryland v. Jones*, 256 Ky. 181, 192, 75 S. W. 2d 1057, 1062 (1934).

In any event the Secretary's refusal to dispense with the requirements of paragraph 4 was not arbitrary. The appellants make the mistaken assumption that the Secretary was bound to consent to the surrender unless he had facts upon which to base a refusal. The converse of that statement would be closer to the truth, namely, that he was under a duty to the Indians to refuse to accept a surrender unless he had facts before him which convinced him that it should be accepted. It was certainly not arbitrary for the Secretary to decide that the facts and opinions offered by the lessee did not overcome reasonable doubt as to the nonexistence of oil or gas (in the absence of extensive drilling).

Appellants' contrary argument (Br. 23, 38) also overlooks the fact that both the statute (R. 9) providing for the leasing of these tribal lands and paragraph

4 of the lease specifically state that the wishes of the Tribal Council of the Indians will be consulted in matters affecting the lease of their lands. The Tribal Council was consulted in this case (R. 40, 112) and it was determined that the desire of the Council that the lessee be held liable for the amount of the bond was "reasonable and should be followed" (R. 40). Therefore, even if the Secretary of the Interior had not reserved absolute power to insist on the drilling of four wells, his refusal to forfeit the bond cannot be considered arbitrary. Despite appellants' contention to the contrary (Br. 28), the desire of the Blackfeet Tribal Council that the bond be forfeited does not beg the question whether good cause was shown to the Secretary. In a matter such as this, the opinions or wishes of the Indians have a direct bearing on the question of good cause and are entitled to as much consideration as any other opinions, wishes, or facts offered to influence the decision of the Secretary. Their desires were considered "reasonable." They furnished a valid basis for the judgment of the Secretary.

It is to be noted that all the authorities cited by the appellants to support their contention that the Secretary acted arbitrarily are cases in which the court refused to override the judgment of the Secretary. The sentence succeeding the quotation used by the appellants from *Anicker v. Gunsburg*, 246 U. S. 110, 119 (1918) (Br. 39) reads as follows:

But it [the statute] does give him power to consider the advantages and disadvantages of the lease presented for his action, and to grant or withhold approval as his judgment may dictate.

And on page 120 of that case the court said:

The fact that he has given reasons in the discussion of the case, which might not in all respects meet with approval, does not deprive him of authority to exercise the discretionary power with which by statute he is invested.

The statute in the present case gives to the Secretary of the Interior the power to lease Tribal Indian lands. It leaves to his discretion every decision and every administrative detail necessary to the effective carrying out of this power. Since his decision was not arbitrary, it is not subject to review by the courts. *United States v. California &c. Land Co.*, 148 U. S. 31, 43 (1893); *United States v. Lane*, 269 Fed. 202, 204 (App. D. C. 1920); *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 324-325 (1903).

III

The lessee was not excused from further performance on the theory that the subject matter of the contract had ceased to exist

The appellants contend that the lessee was excused from performance "because the presence of oil and gas was proved not to exist" (Br. 42). This contention is without merit. The subject matter of the contract is first of all the testing of the leased premises in the specific manner provided in the lease. As stated in *Fidelity & Deposit Co. of Maryland v. Jones*, 256 Ky. 181, 75 S. W. 1057 (1934), and in *Rice v. Ege*, 42 Fed. 661 (C. C. N. Y. 1890) no other test can be substituted and until it is completed the lessee is precluded from claiming that there is no oil or gas underlying the leased premises.

The case of *Woodworth v. McClean*, 97 Mo. 325, 11 S. W. 43 (1889), relied on by appellants (Br. 47), is not in point. There the contract called for the sinking of a shaft upon a known vein. The depth of the shaft was by the express terms of the contract measurable along the vein and as a matter of course when the vein disappeared the contract became impossible of performance. An analogy in the present case would exist if the Madison limestone into which the lessee agreed to drill to the depth of 100 feet should disappear. Since there is no allegation to that effect there is nothing impossible nor any unforeseen difficulty in the performance of the lessee's covenants.

CONCLUSION

It is accordingly submitted that the judgment of the district court should be affirmed.

Respectfully,

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JANUARY 1943.

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

R. E. LEE and STANDARD ACCIDENT
AND INSURANCE COMPANY, a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANTS

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE DIS-
TRICT OF MONTANA

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No. 10293

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

R. E. LEE and STANDARD ACCIDENT
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Appellants,

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UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANTS

STATEMENT

We do not desire to amend the statement of the case made in our original brief. Appellee has seen fit to make a statement (Br. 2-4) which might be inadvertently misleading in one respect. We wish to point out again, and to emphasize again, that the United States contented itself at the time of trial with introducing in evidence only its exhibit No. 1, being a letter demanding payment of the bond within thirty day (R. 81-83). Thereupon it rested, basing its case upon the admissions in the answer and upon Exhibit No. 1. At the end of the defendants' case no rebuttal was offered. All evidence other than Exhibit No. 1 was introduced by the defendants.

ARGUMENT

I.

APPELLEE HAS TACITLY ADMITTED ERROR BY NOT ANSWERING THE CONTENTION THAT IT HAS FAILED TO PROVE THE MATERIAL ALLEGATIONS OF ITS COMPLAINT.

In our original brief we urged that the Government utterly failed to prove the material allegations of paragraph XII of the complaint alleging that the lessee "failed, refused and neglected to show cause, as required by said notice, within thirty days, or at all, why the said lease should not be cancelled" (Appellants' Brief 32-34). Appellee has nowhere sought to answer this argument. The argument cannot be brushed aside. It is founded upon, and based upon, the admissions, pleadings and proceedings of the Government itself.

We again wish to urge point III of the argument in our original brief (Appellants' Brief 32-34).

II.

APPELLEE'S TEST WELL ARGUMENT IS FALLACIOUS, AS WELLS REQUIRED BY LEASE WERE FOR PURPOSE OF DEVELOPING ENTIRE AREA.

Appellee's entire argument is based on the theory set forth in Section 1 of its brief (Br. 4). Appellee argues that because experts differ as to the probability of finding oil and gas, the lease requires the drilling of several regularly spaced test wells and that the United States had the absolute power to insist upon the drilling of four test wells in the first year.

A reading of paragraph 4 of the lease shows the fallacy of this argument and that all of the wells required by paragraph 4 were to "fully develop the land and extract the oil and gas therefrom".

Those familiar with oil and gas leases know that frequently a lease requires a test well before the lessee can surrender the lease. This is not that kind of a lease. It contains no provision for a test well. Lessee's right to surrender upon a showing of good cause would be exactly the same after one well, four wells, eight wells, or any other number of wells had been drilled.

The wording of paragraph 4 conclusively shows that there is no basis for appellee's contention that it had the absolute power to insist upon the actual drilling of four wells.

Paragraph 4 requires the lessee,

"to drill at least four (4) wells on the premises within one year from date of such approval; and to drill four (4) wells during each successive year thereafter until as many wells have been drilled as there are 40-acre tracts or fractional parts thereof included in the lease; and thereafter to diligently drill such additional wells as may be necessary or proper in the judgment of the Secretary of the Interior to fully develop the land and extract the oil and gas therefrom, in accordance with the most approved methods of drilling development in the field where the lands are located."

The requirement was a specific one for the drilling of a sufficient number of wells *to fully develop the land and extract the oil and gas therefrom.*

Appellants' proof, which is not only uncontradicted, but which is entirely corroborated by the reports of

the United States Geological Survey, establishes the absence of oil or gas in the area, establishes the absence of the subject matter of the contract, and establishes good cause for the surrender and cancellation of the lease by the Secretary in accordance with the specific terms of the lease.

A lease is a contract. It is elementary that a contract must be read in its entirety and each provision construed in the light of the other provisions. One cannot consider the effect of paragraph 4 of the lease without at the same time considering paragraphs 7 and 8 and regulation 27. When read together, they unquestionably provide that the lessee can surrender the lease upon a showing of good cause.

In this case the lessee did surrender and show good cause, not only by his evidence but by the reports and recommendations of the United States Geological Survey. We again suggest that no better cause can be shown, that there will probably never be another case where the good cause is based not only on the lessee's evidence, but also on the evidence and recommendations of the geological representatives of the Interior Department.

There is nothing unusual or extraordinary about a lessee having the right to surrender. *1 Thornton Oil and Gas (Willis)* 180, 181. Many oil and gas leases contain a provision to the effect that "lessee shall have the right, at any time on the payment of One Dollar (\$1.00), to surrender this lease and the said premises and thereby be relieved from the performance of the terms hereof, thereafter to be per-

formed", or similar provisions. 7 *Summers, Oil and Gas* (1939) 202 (Mont.), 152, 32; 6 *Thornton, Oil and Gas (Willis)*, 2741 (Cal.), 2747 (Cal.), 2753 (Cal.), 2764 (Ind.), 2771 (Kan.), 2778 (Ky.), 2793 (N. M.), 2796 (Ohio), 2800 (Okla.), 2831 (Penn.), 2835 (Tex.). If a lessee did not have the right to surrender, he could be required to waste money, materials and manpower in useless drilling after there was no probability of producing oil or gas. 1 *Thornton, Oil and Gas (Willis)* sec. 101a.

The present lease, in paragraphs 7 and 8 and regulation 27, recognizes the accepted practice of giving a lessee the right to surrender, but imposes upon a lessee the burden of showing good cause for the surrender. Lee has shown good cause and the Geological Survey has shown good cause for him. The Secretary, having no other facts contrary to the showing of good cause, is not called upon to exercise any judgment or discretion and consequently must consent to the surrender of the lease.

When paragraph 4 is read as a requirement for the drilling of wells *to fully develop the land and extract the oil and gas therefrom*, instead of as a test well paragraph, appellee's arguments entirely fail because their foundation has disappeared.

III.

APPELLEE IS NOT IN A POSITION TO URGE THAT LESSEE FAILED TO SHOW GOOD CAUSE.

We have heretofore urged that good cause was shown by the lessee, that no better cause could have been shown, that the Secretary of the Interior denied

the lessee's application for surrender without any basis in fact or in reason upon which to justify his refusal and in clear disregard of the expert opinion and recommendation of the director and field officers of the Geological Survey. Appellee has tried to meet this argument by a half-hearted contention, half-hearted in part because it is difficult for the Government to justify the taking of such a position.

We assert that appellee is not in a position to urge that the lessee failed to show good cause. Paragraphs XI and XII of the complaint (R. 6-7) allege that Lee, the lessee, was given a notice in writing, "as provided in said lease", that the notice specified a time within which Lee was allowed "to show cause" why the lease should not be cancelled and the bond paid and that Lee failed, refused and neglected to show cause as required by the notice within thirty days, or at all. After taking this position in the complaint and setting forth these allegations as material, the Government then made a change of position which it maintained throughout the remaining proceedings in the case and throughout the trial.

By its motion for judgment on the pleadings the United States completely ignored the defendants' denial of paragraph XII of the complaint. The motion for judgment by the United States was made upon the theory that the Secretary of the Interior has untrammeled and unlimited power to refuse and deny the lessee's request for cancellation and surrender (R. 41-43). Apparently the United States at that time decided to take the position that para-

graphs XI and XII of the complaint were surplusage. Such is the position asserted in paragraph II (2) of the motion (R. 41). The same position is again emphasized in paragraph II (3) of the motion where the Government stated "that the requirement of consent implies the full and unqualified power to refuse the consent" (R. 42). In arguing the motion for judgment and in submitting a memorandum of points thereon, the Government held to its contention that the power of the Secretary to refuse the request for cancellation and surrender was an unqualified power. Consistent with this position, the Government's evidence at the trial was strictly limited to evidence of the giving of notice requiring payment of the bond.

No attempt was made by the Government to prove the allegations of paragraph XII of the complaint. Indeed this is understandable because from the Government's own files came the evidence that good cause had been shown. Indeed no better cause could have been shown to the Secretary in support of the lessee's application for cancellation and surrender.

Now apparently the United States would seek to change its position again, not directly but by the rather clever method of asserting that "even if the Secretary of the Interior had not reserved absolute power to insist on the drilling of four wells, his refusal to forfeit the bond cannot be considered arbitrary" (Br. 12). Even this alternative argument does not assist appellee. Appellee's argument in this respect is founded first upon a statement equally as arbitrary as the action of the Secretary. Appellee states:

"It was certainly not arbitrary for the Secretary to decide that the facts and opinions offered by the lessee did not overcome reasonable doubt as to the non-existence of oil or gas (in the absence of extensive drilling)" (Br. 11).

Appellee's statement is entirely arbitrary. There is no evidence, no fact and no suggestion anywhere in the record that the Secretary *had* any reasonable doubt as to the non-existence of oil or gas. Indeed the facts and opinions offered by the lessee were entirely supported and corroborated by the director and field officers of the Geological Survey, who reported that the leased property had been adequately tested.

Appellee further urges that the wishes of the Tribal Council were consulted and their desires were considered reasonable. Appellee seems mistaken in several particulars. Appellee has asserted that paragraph 4 of the lease specifically states "that the wishes of the Tribal Council of the Indians will be consulted in matters affecting the lease of their lands" (Br. 12). An examination of paragraph 4 of the lease will disclose without question that consultation with the Tribal Council for the guidance of the Secretary was limited to one matter, namely, action upon an application for deferment of drilling and payment of annual rental (R. 14). Nowhere does it appear that the wishes and desires of the Indians give the Secretary room for the exercise of discretion. In paragraph 4 of the lease specific reference is made to the Secretary's power "in his discretion" to extend the time for drilling upon payment of annual rental. There is an entire absence

of such power, and there is an entire absence of any reference to the Indians, in paragraphs 7 and 8 of the lease and in regulation 27.

Again we urge that the desire of the Tribal Council that the bond be forfeited begs the question of whether good cause was shown to the Secretary. The wishes and desires of the Tribal Council are shown to have been "a resolution asking that the lease be cancelled for failure to comply with the drilling requirements" (T. 112). Again this is the very matter in issue. The desire or wishes of the Tribal Council can in this instance be given no greater status than that of a desire or wish to secure some easy money.

Looking to the wishes of the Tribal Council, the Government seeks to justify a change of position. It seeks to change a position asserted by its motion for judgment on the pleadings, by the limited nature of its proof and the failure to offer any evidence in rebuttal and by the nature of its proposed findings of fact and conclusions of law. The change is not supported in fact.

IV.

APPELLEE CANNOT READ PARAGRAPHS 7 AND 8 AND REGULATION 27 OUT OF THE LEASE OF ITS OWN DRAFTING.

The oil and gas lease here involved, and the regulations made a part thereof, were drafted by the United States. Nevertheless, appellee presents the anomalous argument that only paragraph 4 of the lease may be considered. Limiting attention to paragraph 4 and treating it as the only provision of the lease regulating drilling, appellee urges that the Secretary "ex-

pressly reserved in the lease under consideration the absolute power to insist upon the drilling of a specified number of test wells or the forfeiture of the bond for non-performance" (Br. 5). Were paragraph 4 the only provision of the lease relating to drilling, the contention would be sound, and we entirely agree that the lessor could have reserved the absolute power to insist upon the drilling of a specified number of wells. But it is specious to urge, as counsel for the appellee have done, that paragraph 4 is the only provision relating to drilling.

Introducing the entire argument, appellee has asserted that the Secretary of the Interior was cognizant of certain matters of common knowledge about the probability or improbability of finding oil or gas underlying a specific tract of land and that the lessor would want his land fully tested because each dry hole would increase the risk of not finding oil or gas and thus serve to discourage subsequent prospective lessees (Br. 4-5). No justification can be found in the record for such assertions. It does not appear that the Secretary was cognizant of these facts, or that they were facts. Indeed it specifically appears from paragraphs 7 and 8 of the lease and regulation 27 that the Secretary was cognizant of other matters. Paragraphs 7 and 8 and regulation 27 were drafted by the Government. They were present in the lease during all of its term and were present when the complaint was drafted and when paragraphs XI and XII were inserted in the complaint.

Contrary to the Government's present contention,

there were at least two occasions when the Government paid some attention to paragraph 8 of the lease and regulation 27. The Assistant Commissioner of Indian Affairs seems to have been guided thereby in his letter (Exhibit C to the complaint, R. 24-26) giving time and opportunity to the lessee within which "to show cause" why the lease should not be cancelled and the bond paid. Again in the drafting of the complaint, paragraphs XI and XII were inserted, alleging that the lessee failed, refused and neglected "to show cause" as required by the notice, or at all.

We urge again that paragraphs 7 and 8 and regulation 27 were inserted in the lease for a purpose and must be given a reasonable meaning. Again it must be specifically noted that paragraph 8 of the lease makes the regulations of the Secretary "a part and condition of this lease." Appellee's theory of absolute power eliminates every reason or occasion for the insertion of paragraphs 7 and 8 and regulation 27. Appellee's theory brushes aside the two occasions when the Government not only recognized but applied these provisions of the lease.

V.

REGULATION 27 DOES REQUIRE CANCELLATION BY THE SECRETARY FOR GOOD CAUSE SHOWN.

Appellee has made a curious argument regarding regulation 27. Appellee states:

"A general regulation incorporated into the lease *in this indirect fashion*, should not be construed as dispensing with the express require-

ments of paragraph 4 * * * " (Br. 9) (italics ours).

Actually regulation 27 was specifically and directly incorporated into the lease under the terms of paragraph 8 of the lease which specified:

"This lease shall be subject to the regulations of the Secretary of the Interior now or hereafter in force relative to such leases, all of which regulations are made a part and condition of this lease" (R. 17).

Not only was regulation 27 made a part of the lease but it was made a condition of the lease. The incorporation of the regulation was *direct and specific*. Indicative of the importance of regulation 27 as a part and condition of the lease is the fact that this particular regulation was substantially changed by order dated May 31, 1938. *6 Summers Oil and Gas* (1942 Cumulative Pocket Parts), sec. 1013, pp. 114-115. The new regulation 27 now in effect (but adopted about four months after demand for payment of the bond was made upon the lessee and his surety in this case on February 3, 1938) eliminates the provision that "a lease will be cancelled by the Secretary of the Interior for good cause." Instead of this provision the new regulation specifies that upon the occurrence of ten detailed conditions the lessee "may, on approval of the Secretary of the Interior, surrender a lease or any part of it." Obviously this change bestows upon the Secretary of the Interior much greater power than he had under the old regulation in effect during all of the time of the lease here considered.

Urging that regulation 27 reserves to the Secretary

the determination of what constitutes good cause, appellee makes this flat assertion:

"In fact regulation 58 discloses that the Secretary's decision 'shall be conclusive.' " (Br. 9).

We flatly disagree. Regulation 58 is as follows:

"Failure to comply with any provision of the lease or of these regulations shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a fine of not more than \$500 per day for each and every day the terms of the lease or the regulations are violated, or the orders of the officer in charge pertaining thereto are not complied with, or to both such fine and cancellation, in the discretion of the Secretary of the Interior: Provided, That the lessee shall be entitled to notice and hearing with respect to the terms of the lease or of the regulations violated, which hearing shall be held by the officer in charge, whose finding shall be conclusive unless an appeal be taken to the Secretary within 30 days after notice of the decision of the officer in charge, and the decision of the Secretary of the Interior upon appeal shall be conclusive." *6 Summers, Oil and Gas*, (1939) sec. 1013, p. 322.

This regulation, we submit, is not applicable to the present situation. The provision for hearing before a local officer in charge and appeal therefrom to the Secretary was not followed. Moreover, the only local officer in charge would seem to have been the field officer of the Geological Survey whose finding was favorable to the lessee and whose recommendation was specifically and directly disregarded by the Secretary of the Interior.

We urge that no better cause could have been shown by the lessee than was made in this instance.

The Geological Survey could not "justify any requirement for the additional three wells" (R. 88) and were "of the opinion that the lands * * * have been adequately tested" (R. 112). In the wording of the regulation ("will be cancelled by the Secretary of the Interior for good cause") no basis exists for the exercise of administrative discretion where there were no facts except those showing good cause.

VI.

PARAGRAPH 7 WHEN CONSIDERED WITH PARAGRAPH 8 AND REULATION 27 DOES NOT PERMIT THE SECRETARY OF THE INTERIOR TO EXERCISE UNTRAMMELED OR ARBITRARY JUDGMENT.

Appellee urges that "matters involving the judgment of the promisee are excluded from the 'satisfaction of a reasonable man' rule" (Br. 11). We agree. The question here presented to the Secretary was not one of judgment. It is not so stated in the lease or the regulations. The only approximation of the term "judgment" is used in paragraph 4 of the lease where it is specified that the Secretary may "in his discretion" extend the time to drill upon payment of annual rental. No such similar language is used in paragraph 7. The word "consent" there employed must be read and considered in connection with paragraph 8 and regulation 27. We refer again to our argument in the original brief (p. 38).

CONCLUSION

Points V, VI and VII of our original brief are covered by Appellee in such a way as to call for no reply (Br. 12-14).

We submit that the judgment of the District Court should be reversed and directions given for the entry of judgment for the defendants-appellants.

Respectfully submitted,

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